The

Madras Law Journal

(Reports)

II] JULY [1966

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. VEERASWAMI.

EM. A. Sathar and another .. *Petitioners**

v.

K. S. Sengappa Gounder . *Respondent.*

Civil Procedure Code (V of 1908), *Order* 33, *rule* 9—*Suit* in forma pauperis—*Death of plaintiff pending disposal of—Sons of deceased added as legal representatives—Existence of means of sons to pay Court-fee—If a ground for dispaupering them.*

Where the plaintiff who has filed a pauper suit dies pending disposal of the same and his sons on their own application are added as legal representatives of the deceased and as plaintiffs, the fact that the sons had means to pay Court-fees would not be a ground for dispaupering them and directing them to pay Court-fees It may be that under their personal law the sons were entitled to succeed to certain fractional share in the properties of the father But that does not mean that they are any the less the legal representatives of the deceased plaintiff Where of course parties come on record not in the place of the deceased but in their own capacity and continue the suit, it may make a difference whether such parties as plaintiffs have the necessary means to pay Court-fees

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Sub-Court, Erode, dated 4th August, 1964, in I.A. No. 913 of 1962 in O S. No. 89 of 1961.

V S. Subramaniam, for Petitioner.

Soundarapandian, for Respondent.

The Court made the following

ORDER —This petition by plaintiffs 2 and 3 is to revise the order of the Subordinate Judge of Erode allowing an application filed by the fourth defendant to dispauper them and to direct them to pay Court-fee. The suit was originally instituted by one Muhammed Hussain, who died *pendente lite* leaving his widow and two sons. It appears the widow would not come on record as a plaintiff and so his sons on their application were added as legal representatives and as plaintiffs 2 and 3 The Court below found that the petitioners in this Court had means to pay Court-fees and on that view and also relying on *Arumugha* v *Subramania*[1] allowed the application.

It seems to me that the order cannot be supported. The Subordinate Judge has not found that plaintiffs 2 and 3 have been added as such in their own capacity and not as legal representatives of the deceased In fact, he, at the outset, of his order, mentioned that the two sons were added as the legal representatives of the

*C R P No 1902 of 1964 29th October, 1965

1. A I.R. 1931 Mad. 324

deceased plaintiff It may be that under their personal law the legal representatives were entitled to succeed to certain fractional share in the properties of their father along with their mother But that does not mean that they are any the less the legal representatives because they have come into the suit in the place of the deceased plaintiff Where of course parties come on record not in the place of the deceased but in view of the death of the plaintiff in their own capacity and continue the suit, it may make a difference whether such parties as plaintiffs have the necessary means to pay the Court-fees In such a case, it may be proper and necessary to allow an application to dispauper under Order 33, rule 9 of the Civil Procedure Code But this is not such a case I do not think therefore that the principle of *Arumugha* v *Subramania*[1] is applicable to it

The petition is allowed No costs.

V K ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE T. VENKATADRI.

Employees State Insurance Corporation, through its Insurance Inspector, Madras . *Appellant**

v

Messrs. Mysore Premier Metal Factory, Madras . *Respondent*

Factories Act (LXIII of 1948), *section* 21 (1) (iv) (*c*)—*Employees State Insurance Act (XXXIV of* 1948), *section* 66 (1)—*Duty of factory employer to fence dangerous parts of a machinery—Injury to employee from a dangerous machinery not fenced—Negligence of employee or absence of report of any defect in machinery by Factory Inspector—If absolves employer of his liability to pay compensation*

Under section 21 (1) (iv) (*c*) of the Factories Act, 1948, it is the duty of an employer who is running a factory to securely fence every part of a dangerous machinery and the employer cannot escape this liability by saying that it is impossible for commercial or mechanical reasons to fence the machine or part of a machine If a machine is dangerous, the obligation is to fence and even substitutes for fencing will not enable the employer to evade his liability. When there is default in this regard on the part of the employer and an injury is suffered by an employee as a consequence, the fact that the employee concerned suffered the injury due to his own negligence or the fact that the Factory Inspector had not reported of any particular defect in the machinery in his prior inspection would not absolve the employer of his liability to compensate the injured employee or to reimburse the State Insurance Corporation when it had paid compensation to the injured employee under the Employees State Insurance Act, 1948

Appeal against the Order of the City Civil Court, Madras, dated 18th December, 1963 in E I.P.P No. 12 of 1963

M. Chinniappan for the Government Pleader, for Appellant.

P. V Marthandan for *Messrs King & Partridge*, for Respondent

The Court made the following

ORDER —This appeal arises out of an order passed by the First Assistant Judge, City Civil Court, Madras, on an application filed by the appellant, Employees State Insurance Corporation, for reimbursement of a sum of Rs. 1,061-62, by the respondent herein, Messrs Mysore Premier Metal Factory The learned Assistant Judge dismissed the application on the ground that it was due to the negligence on the part of the employee that the accident occurred and that as such the employer, respondent, was not liable to pay any sum or to contribute any amount paid by the appellant herein Hence this appeal

The respondent is carrying on business as manufacturer of aluminium sheets and circles, and aluminium, brass and stainless steel utensils. One Murugesan was involved in an accident while operating a machine which is used to cut aluminium sheets for the purpose of making aluminium spoons. As a result of the accident, the said Murugesan's left index-finger was jammed He was an insured person. The Medical Board certified that he has been permanently disabled and awarded compensation as per rules The appellant herein paid compensation to the injured

1. A I R 1931 Mad 324

* A A O No 183 of 1964 4th January, 1966.

employee Murugesan and called upon the respondent herein, the employer, to pay the same But the respondent disputed their liability on the ground that it was only due to his own negligence that the worker sustained the injury Now the question to be considered by me is whether the respondent is liable to pay the amount claimed by the appellant herein

The relevant provision in the Factories Act, is section 21 (1) (iv) (*c*) which is as follows.

"In every factory the following namely

* * * * * * *

(*c*) every dangerous part of any other machinery shall be securely fenced by safeguards of substantial construction which shall be kept in position while the parts of machinery they are fencing are in motion or in use"

A similar question I had to consider in *Employees State Insurance Corporation* v. *Sri Karumuthi Thyagaraja Chettiar, Principal Employer, Sri Meenakshi Rice Mills, Ltd, Madura*[1], wherein I have held that it is the duty of the employer who is running a factory to make every sort of protection for the safety of the employees The machinery must be so fenced as to give security from such dangers as may be reasonably expected, as observed in *Caroll* v *Andrew Barcley & Sons, Ltd*[2] The words 'securely fenced' are not to be interpreted as reasonably fenced or moderately fenced The employer will not be able to defend himself by saying that it is impossible for commercial or mechanical reasons to fence the machine or part of a machine If a machine is dangerous, the obligation is to fence, and even substitutes for fencing will not enable the employer to evade his liability. Cases in Court of Appeal *e g*, *Chatney* v *Nairn (Micheal & Co, Ltd)*[3], have gone to the extent of holding that even though an employer displayed a notice which said,

"Do not put your hands in the machinery while it is in motion Persons disregard this notice at their own risk"

still when a workman is injured when he is operating the machine, the employer is liable to pay contribution

The respondent further relied on the evidence of P W 1 who admitted in cross-examination that he had no report of any particular defect in the machinery in the prior inspection Even then the employer is liable as has been held in *John Summers & Sons, Ltd* v *Frost*[4], wherein the following passage from *Mitchell* v. *North British Rubber Co, Ltd*[5], has been extracted

"The question is not whether the occupier of the factory knew that it was dangerous, nor whether a Factory Inspector had so reported , nor whether previous accidents had occurred , nor whether the victims of these accidents had, or had not been contributorily negligent The test is objective and impersonal"

Therefore, I am of the view that the respondent herein did not safeguard the machinery properly and therefore he is liable to pay the contribution as claimed by the appellant, *viz*, Rs 1,061-62 P.

In the result, the appeal is allowed but there will be no order as to costs

V K *Appeal allowed.*

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1 (1965) 79 L W 122
2 (1948) 2 A E R 386
3 (1937) 1 A.E.R 376.
4 L R (1955) A C 740 at 766
5 (1945) S C J 60

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

V. Baluswamy Servai .. *Petitioner**

v.

N. Raju Servai .. *Rsspondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 2 (6) and 10 (3)(a) (i)—House in occupation of tenant usufructuarily mortgaged by owner—Tenant attorning to such mortgagee—Mortgagee if "landlord" under section 2 (6)—If can evict tenant under section 10 (3) (a) (i) for his personal occupation

Where a residential building in the occupation of a tenant is usufructuarily mortgaged by its owner and the tenant attorns to such mortgagee, the usufructuary mortgagee would not be entitled under section 10 (3) (a) (i) of the Madras Buildings (Lease and Rent Control) Act, 1960 to evict the tenant on the ground of his *bona fide* requirement of the premises for his personal occupation The contention that it is only the owner who is entitled to evict the tenant under section 10 (3) (a) (i) is untenable. There is nothing in that section to limit the benefit thereof to the owner The benefit thereof is given to a 'landlord' within the meaning of section 2 (6) of the Act A usufructuary mortgagee of a building in the occupation of a tenant would be entitled to receive the rent of the building on his own account and therefore comes squarely within the first part of the definition of landlord in section 2 (6) of Madras Act XVIII of 1960

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of Madurai dated 5th January, 1966, and made in C R P No. 683 of 1965 (R C A No. 28 of 1965 on the file of the Court of the Subordinate Judge, Madurai—R C O.P. No. 606 of 1964, Rent Controller, Madurai Town).

K. V. Sankaran, for Petitioner.

The Court made the following

ORDER :—The tenant is the petitioner herein The owner let him into possession of the property as tenant Subsequently, one Raju Servai took a usufructuary mortgage of the property and the tenant Baluswami Servai attorned to Raju Servai. Raju Servai filed a petition for eviction of the tenant on the ground, *inter alia,* that he wanted the house for his own occupation. He did not have a house of his own nor his son His requirement was found to be *bona fide* and eviction was ordered by the Rent Controller and the order was confirmed on appeal by the learned Subordinate Judge and in revision by the learned Additional District Judge.

The point taken by Sri K.V. Sankaran, learned Counsel for the petitioner, before me is that though Raju Servai might satisfy the definition of 'landlord' in section 2 (6) of Madras Act XVIII of 1960, none but the owner will be entitled to recover possession from the tenant on the ground of *bona fide* requirement of the premises for personal occupation. The relevant provision of the Act is section 10 (3) (a) (i) which says that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of the building, in case it is a residential building, if the landlord requires it for his own occupation or for the occupation of his son and he or his son is not occupying a residential building of his own in the city, town or village concerned. The definition of a 'landlord' in section 2 (6) is :

"Landlord includes the person who is receiving or is entitled to receive the rent of a building, whether on his own account or on behalf of another or on behalf of himself and others or as an agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent, if the building were let to a tenant "

Raju Servai is a person who is entitled to receive the rent of the building in his capacity as usufructuary mortgagee and is therefore a 'landlord' within the meaning of the definition and, as I have said, the learned Counsel himself concedes it. The argument, however, is that it is only the owner who is entitled to evict the tenant for personal occupation under section 10 (3) (a) (i) There is however nothing in that section to limit the benefit thereof to the owner. The benefit thereof is given to a landlord and for that we must turn to the definition in section 2 (6) and we have seen that Raju Servai is a 'landlord' within the meaning of that definition. Learned

* C.R.P. No. 393 of 1966. 25th February, 1966.

Counsel raises the question whether that means that a person like an agent, trustee, executor, administrator, receiver or guardian could claim the benefit of section 10 (3) (*a*) (i). It is unnecessary to answer that question in the present case, because Raju Servai is a person entitled to receive the rent of the building on his own account and therefore comes squarely within the first portion of the definition of 'landlord' and there is no principle of law by which his right could be defeated. If the original owner had sold the property to Raju Servai, Raju Servai would have become the owner and could have filed the petition for eviction. By getting an usufructuary mortgage instead, he still gets the same benefit. Sri Sankaran admitted that he could not say that the mortgage was nominal or collusive He however prays that because there appears to be no decided case either way on the question, the petition may be admitted. I do not think it necessary to admit the petition on that ground, when the matter seems to me to be clear. The petition is accordingly dismissed. The petitioner is, however, given two months' time from to-day to vacate the premises.

V.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE P. RAMAKRISHNAN.

Syed Abdul Azoozkhan .. *Petitioner**

v.

The Divisional Accounts Officer, Southern Railway, Royapuram, Madras .. *Respondent.*

Civil Procedure Code (V of 1908), section 39 and Order 21, rule 4—Relative scope—Transfer of decree to Court of Small Causes for execution—Cannot be ordered where pecuniary value of decree exceeds that specified in Order 21, rule 4.

Order 21, rule 4 of the Civil Procedure Code must be considered as a special provision to be applied where the transfer of the decree is sought from the decreeing Court to a Court of Small Causes and in that event the money value of the decree prescribed in Order 21, rule 4 will apply The provisions of Order 21, rule 4 have also to be complied with by the Court which passed the decree before it proceeds to transfer the decree to another Court for execution If the amount of the decree exceeds the pecuniary value set down in Order 21, rule 4, the decreeing Court cannot, either of its own motion or on the application of the decree-holder, transfer the decree, for execution to the Court of Small Causes, but it should transfer the decree to some other Court, like the City Civil Court Order 21, rule 4 really provides a rule of procedure for the decreeing Court to adopt, depending upon the value of the decree sought to be transferred for execution. Section 39 of the Civil Procedure Code is a general provision and the decision in *Abdullah Sahib* v. *Ahmed Hussain Sahib* A I R. 1914 Mad. 206 (1) rendered with reference to that provision cannot be relied upon in interpreting Order 21, rule 4.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of Small Causes (Full Bench), Madras dated 24th November, 1965, and made in N.T.A. No 207 of 1965 (against M.P. No. 920 of 1965 in E.P No. 2918 of 1964, Registrar, Court of Small Causes, Madras in O S. No. 61 of 1961 on the file of the District Munsif's Court, Sholinghur).

S. V. Rama Iyengar, for Petitioner.

The Court made the following

ORDER.—The decree-holder in O.S. No. 61 of 1961 on the file of the District Munsif's Court, Sholinghur, obtained transmission of the decree from that Court to the Court of Small Causes, Madras, for execution of the decree by attachment of an amount lying to the credit of the judgment-debtor's provident fund and gratuity account in the Southern Railway, Madras The amount sought to be recovered under the decree was Rs. 4,532-15 The Registrar of the Court of Small Causes who heard the execution petition, dismissed it on two grounds (1) the amount sought to be attached being in the nature of a provident fund amount, could not be proceeded against in execution and (2) under Order 21, rule 4, Civil Procedure Code the Court which passed the decree had no jurisdiction to transfer the decree for execution to the Court of Small Causes, Madras. The decree-holder

*C R P No 398 of 1966 4th March, 1966.

filed a New Trial Application against the said order. In the judgment of the Judges who heard this application, no reference is found to the objection in regard to the amount sought to be attached being in the nature of a provident fund amount. But they confirmed the Registrar's finding that Order 21, rule 4, Civil Procedure Code barred the case from the cognizance of the Court of Small Causes, Madras. It is against this decision that the present revision petition is sought to be filed by the decree-holder

Learned Counsel appearing for the decree-holder relied upon the decision of a Bench of this Court in *Abdulla Sahib* v *Ahmed Hussain Sahib*[1], where the view has been expressed that where a decree is sent to another Court for execution on the application of the decree-holder himself, and not by the Court of its own motion, the question of competence by jurisdictional value of the Court to which the decree is sent, does not arise The Bench was required to consider in that particular case the distinction between the two limbs of section 39, Civil Procedure Code, section 39 (1) dealing with a case where a decree, on the application of the decree-holder, is sent for execution to another Court, and section 39 (2), which deals with a case where the Court of its own motion sends the decree passed by it for execution to any subordinate Court of competent jurisdiction , while in section 39 (2) the words "of competent jurisdiction " are found, they are not found in section 39 (1) Consequently, the Bench held that the jurisdictional value will not apply to decrees sent, on the application of the decree-holder, by the decreeing Court to another Court for execution This provision in section 39, Civil Procedure Code is a general provision Order 21 rule, 4 Civil Procedure Code must be considered as a special provision to be applied where the transfer of the decree is sought from the decreeing Court to a Court of Small Causes, and in that event the money value of the decree prescribed in Order 21, rule 4 will apply. The provisions of Order 21, rule 4 have also to be complied with by the Court which passed the decree before it proceeds to transfer the decree to another Court for execution If the amount of the decree exceeds the pecuniary value set down in Order 21, rule 4, the decreeing Court has to comply with that provision and therefore it is not empowered to transfer the decree for execution to the Court of Small Causes, Madras but it should transfer the decree to some other Court, like the City Civil Court, Madras Order 21, rule 4, Civil Procedure Code, really provides a rule of procedure for the decreeing Court to adopt, depending upon the value of the decree sought to be transferred for execution. The decision in *Abdulla Sahib* v *Ahmed Hussain Sahib*[1], does not at all deal with the scope of Order 21, rule 4 The observations in that decision apply only to the distinction between section 39 (1) and section 39 (2), Civil Procedure Code, and cannot be relied where the provision interpreted is Order 21, rule 4, Civil Procedure Code Further, section 121, Civil Procedure Code states that the Rules in the First Schedule shall have effect as if enacted in the body of the Code The Rules have therefore valid effect along with the main sections of the Code and we have to read Order 21, rule 4, and section 39, Civil Procedure Code in a harmonious manner, without spelling out an inherent conflict between them This general principle of interpretation is consistent with the view that I have expressed above, regarding the relative scope of Order 21, rule 4 and section 39, Civil Procedure Code I see no grounds to admit this Revision Petition, which is dismissed.

V K. *Petition dismissed.*

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1. A I R 1914 Mad 206 (1).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Jabamalai Mariammal and another .. *Appellants**

v.

A. Madalamuthu Thevar and another .. *Respondents.*

Will—Construction—Principles—Will providing for absolute gift of property with full powers of alienation in favour of a legatee followed by a gift over of the property in favour of others after the death of the first legatee—Proper construction—Alienation of the property by the first legatee—Validity.

In interpreting a will it is the duty of the Court to find out the intention of the testator. The true intention has to be gathered from the language used by the testator, as he has conveyed the expression of his wishes in the words employed by him in the instrument. All the parts of the will are to be construed with reference to each other and so as, if possible, to form one consistent whole. On a question of the true interpretation of a will decisions on the construction of other wills may be useful only so far as they lay down the principles of law which have to be observed in the construction of wills.

In cases of wills providing for an absolute gift of property with all powers of alienation in favour of one legatee followed by a gift over of the property after the death of the first legatee, difficulty has been frequently experienced by Courts in determining whether the latter clause should be ignored as void, being an attempt to lay down a rule of devolution when the property has already been taken absolutely by some one else, or whether the latter clause should be construed as one by way of defeasance so as to cut down the absolute estate conferred under the former clause to a life estate. A distinction between a defeasance clause and the repugnant one is very often a nice one and in several cases Courts have adopted an intermediate construction of construing a prior absolute gift as an estate for life with a power of appointment by deed or will and the subsequent limitation or bequest taking effect in case the power of appointment had not been exercised. Even though for practical purposes, there is no distinction between an absolute estate and a life estate coupled with a power of appointment by will or deed, it is settled law that the ideas are two distinct conceptions and that it is quite competent to a testator to confer a life estate with a power of appointment by a deed or will following it up by an independent or subsequent bequest in case the first legatee dies without exercising the power of appointment. Thus, if the intention expressed or necessarily implied on reading all the clauses of the will is to modify the absolute estate, the absolute estate is to be given effect to as a life estate with a power of appointment. This construction of the clause would best effectuate the intentions of the testator in either case, when there is an alienation in pursuance of the exercise of the power of appointment or when the first legatee dies without alienating. In a case where the prior legatee alienates the property before his death, such an alienation has to be and is upheld in view of the fact that absolute estate with powers of alienation has been conferred under the will and in such a situation, there is nothing on which the latter clause could operate. On the other hand if the first legatee dies without exercising the powers of alienation, the intention of the testator again is effectuated by the legatees mentioned in the latter clause taking the property as provided therein.

Where there is an absolute gift of property followed by a gift over of the property after the death of the donee, to construe the latter clause as cutting down the prior absolute estate into a simple life estate with no powers of alienation would be doing violence to the express language of the will and attaching decisive and outweighing importance to the latter clause, ignoring altogether the express power of alienation conferred in the earlier clause. Under the guise of adopting a rule of harmonious construction, there is no justification for adopting a construction which in effect destroys the operative force of the clear words contained in the first clause.

Where a testatrix provided in her will that after her death her husband shall become the absolute owner of her property enjoy the same with full powers of alienation (*sarva swathanthira bagyangaludan*) and further provided that after the lifetime of her husband her son shall become the absolute owner of the property and the husband alienated the property during his lifetime.

Held, the alienation cannot be questioned by the son.

An unqualified absolute estate was conferred on the husband without any restrictions whatsoever. The intention of the testatrix was to maintain an absolute estate in favour of her husband. The subsequent bequest in favour of the son would take effect only if the husband died without alienating the property. But if he had alienated, the validity of the alienation must be upheld in view of the express terms of the will as otherwise the intention of the testatrix would be frustrated.

Appeal against the Decree of the Sub-Court, Coimbatore, in A.S. No. 44 of 1961, preferred against the Decree of the District Munsif's Court of Coimbatore in O.S. No. 1678 of 1958.

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*Second Appeal No. 180 of 1962. 29th April, 1965.

M. R Narayanaswamy and *N. Kannan*, for Appellants.

T. R. Ramachandran and *K. Chandramouli*, for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 2 and 3 who have failed in both the Courts are the appellants in this Second Appeal, which raises the question of the true interpretation and construction of a will, Exhibit A-3, left behind by one Mariammal, who died in November, 1954. She left behind her, her husband, Anthonimuthu, a son Madalamuthu Thevar, the plaintiff in the suit, a daughter, Annammal the first defendant and Jabamalai Mariammal, the second defendant, being the widow of a predeceased son She first created a will, Exhibit A-2, dated 30th November, 1950, under which she bequeathed a house and vacant site of an extent of ten cents T S. 230 in Coimbatore Municipal Town to her husband, Anthonimuthu, to be taken by him with all powers of alienation and சர்வ சுதந்திர பாத்தியங்களுடன். Under this will it was also provided that after the death of her husband, Anthonimuthu, the southern half in the ten cents of vacant land and the house aforesaid was to be taken by the plaintiff, Madalaimuthu with absolute powers of alienation, while the northern half, was to be taken by her daughter, Annammal the first defendant, and her daughter-in-law, Jabamalai Mariammal, second defendant, in equal halves similarly with absolute powers of alienation. Mariammal revoked and cancelled Exhibit A-2 and executed a second will, Exhibit A-3 with which we are now concerned on 25th April, 1951. Under this will, she bequeathed properties to her husband Anthonimuthu to be taken by him with all powers of alienation and சர்வ சுதந்திர பாத்தியங்களுடன் In striking contrast to the provision in the earlier will, Exhibit A-2, this will provided that on the death of Anthonimuthu the entire property as one block, the ten cents of land and the house, was to be taken by the son of the testatrix, Madalaimuthu with all powers of alienation and சர்வ சுதந்திர பாத்தியங்களுடன். At the same time, it provided that Madalaimuthu, the plaintiff should pay a sum of Rs. 300, to the daughter, Annammal, the first defendant and also pay another sum of Rs. 300, to the daughter-in-law Jabamalai Mariammal, and that if Madalaimuthu, defaulted to make such payment, the aforesaid two ladies would be entitled to recover the sum from him by resort to Court proceedings. There is the further provision that the two ladies aforesaid have no right whatsoever over the properties and that even if they made any claim, it would be invalid.

The testatrix died on 14th November, 1954, and her husband, Anthonimuthu became entitled to the properties under the terms of the will. Anthonimuthu executed a settlement deed Exhibit A-4 dated 19th May, 1955, under which he gave the southern half of this property to the plaintiff and the northern half in two equal shares to the first and the second defendants. Anthonimuthu died on 1st May, 1956. Under Exhibit B-1 dated 11th December, 1957, the second defendant sold to the third defendant her half-share in the northern half which was followed up by a partition Exhibit B-3 dated 11th June, 1958, between the first and the third defendants with regard to the northern half. The plaintiff filed the suit to recover possession of northern half of T. S. 230, the site and the house, on the ground that under the later will Exhibit A-3, what was bequeathed to Anthonimuthu was only a life estate, and that on his death, the plaintiff became entitled to the entire property including the northern half, the subject-matter in dispute, and in the possession of defendants 1 and 3 The Courts below have decreed the suit accepting the plaintiff's construction of the will. Hence the present Second Appeal.

At this stage it may be mentioned that after the death of the testatrix, Mariammal, the parties proceeded on the footing that Anthonimuthu was entitled to an absolute estate under the will, Exhibit A-3 The deed of settlement, Exhibit A-4, under which the southern half was settled upon the plaintiff proceeds on that footing. The sale deed Exhibit B-1 and the partition Exhibit B-3 also proceeded on that footing The payment of property tax, *etc.*, by all the parties concerned shows that the plaintiff himself has accepted the position that an absolute estate was conferred upon Anthonimuthu.

The main point in controversy centres round the question whether the will Exhibit A-3 should be construed as creating an absolute estate in favour of Anthonimuthu followed by repugnant clause which should be held to be void or whether on a construction of all the clauses together it should be held that there is no intention to confer an absolute estate but only a life estate in favour of Anthonimuthu, and the later bequest in favour of the plaintiff, Madalaimuthu, is not a repugnant provision but is an independent bequest to take effect on the death of Anthonimuthu.

The relevant clauses in Exhibit A-2 the earlier will may now be extracted :

"3 After my death my husband Anthonimuthu Thevar shall become the absolute owner of the property (*sarva swathanthira bathyangaludan*) mentioned below, take possession of the same shall enjoy it with full right of alienation by gift or otherwise

4 After my lifetime and after the death of my husband Anthonimuthu Thevar, my son Madalaimuthu Thevar shall become the absolute owner of the five cents southern portion of the ten cents land purchased by me with half share of the southern side of the tiled building built by me on the ten cents land, take possession of the same and shall enjoy it with full rights of alienation by gift etc

5 After me and after the death of my husband Anthonimuthu Thevar of the schedule described property, while the southern half of the ten cents, site and of the southern half of the buildings are taken by my son Madalaimuthu as stated in para 4 above, the balance of the five cents lands and half of the buildings forming northern portion shall be equally divided between Jebamalai Ammal widowed wife of my another son deceased Sevalai Thevar They shall get is in equal shares, and shall enjoy their shares absolutely subject to rights of alienation by gift etc . "

The relevant clauses of Exhibit A-3 of the will in dispute may also be extracted

"2 After my death my husband Anthonimuthu Thevar shall become absolute owner (*sarva swathanthira bathyangaludan*) of it take possession of same and shall enjoy it with full right of alienation by gift or otherwise

3 After my lifetime and after the death of my husband Anthonimuthu Thevar my son Madalaimuthu Thevar shall become the absolute owner of the property mentioned in the scheduled below, that is, ten cents of land and the tiled house thereon, shall take possession of it and enjoy it with full powers of alienation, gift, *etc* He shall pay the municipal taxes due

4 After me and after the lifetime of my husband my son Madalaimuthu Thevar shall pay Jebamalai Mariammal wife of my late son Sevalai Thevar, and my daughter, Annammal, wife of Gabriel Thevar Rs 300, in cash each and get registered receipts If he fails to pay the same Jebamalai Mariammal and Annammal shall have the right to collect Rs 300 each from Madalaimuthu through Court But Jebamalai Mariammal and Annammal shall have no right in the said property If they make any claims of right to the property or file any suit and make any thagarar etc in a Court, the same is not sustainable

All the details mentioned in the will shall come into effect after my lifetime I have full right to alter or cancel this will and write another will during my lifetime

I hereby revoke my earlier registered will dated 30th November, 1950, Document No 120 of 1950 R O Book 3, Volume 31, pages 26-28 with my full heart "

Counsel on both sides cited a number of decisions but none of those cases dealt with a testamentary disposition couched in precisely the same terms as that we are now concerned with. In interpreting a will it is the duty of the Court to find out the intention of the testator The true intention has to be gathered from the language used by the testator, as he has conveyed the expression of his wishes in the words employed by him in the instrument. All the parts of the will are to be construed with reference to each other, and so as, if possible, to form one consistent whole. On a question of the true interpretation of a will decisions on the construction of other wills may be useful only so far as they lay down the principles of law which have to be observed in the construction of wills. It is necessary to follow the following note of warning of Joyce, J., in *Sanford v. Sanford*[1]

"The rule is to construe a will *ut res magis valeat quam pareat* and to give effect, so far as possible, to all the words used by the testator . It has been said by the Court of Appeal that the true way to construe a will is to form an opinion apart from the decided cases and then to see whether these decisions require any modification of that opinion, not to begin by considering how far the will in question resembles other wills upon which decisions have been given "

Let us now take up the question of the will Exhibit A-3. The bequest in favour of the husband Anthonimuthu is contained in clause 2 and taking that clause alone,

1 L R (1901) 1 Ch 939

there can be the least doubt that an unqualified absolute estate has been conferred therein. The language used is of the widest amplitude containing no restrictions, whatsoever The words சாவ சுதந்திர பாத்தியங்களுடன் have been used besides expressly stating that Anthonimuthu should enjoy the property with all powers of alienation and with சகல வைபவங்களுடன் The bequest contains well recognised, technical words of known legal import and the clear, unambiguous and dispositive words are more than ample to confer an abosolute estate It is unnecessary to refer to the several decisions in which the wide import and significance of the use of the words சாவ சுதந்திர பாத்தியங்களுடன் have been emphasised.

The question next arises whether there is anything in the set up of the will, its surrounding circumstances and the other clauses in the will, to prevent the Court from effectuating and giving effect to the clear express intention of the testatrix I am free to confess that the question is not free from difficulty, but on a careful consideration of all the clauses in the will, I am of the opinion that the contention put forward by the appellants should be accepted

Here again, it is unnecessary to refer to the numerous cases cited at the Bar, as every one of those cases turned upon the particular provisions in the will. As the judicial decisions reveal, difficulty has been frequently experienced by Courts in determining the effect of the latter and subsequent clauses of the will, engrafting an executory device or a " gift over," in favour of other persons on happening of a contingency, *i e.*, whether the latter clause should be ignored, as void, being repugnant to the former clause, being an attempt to lay down a rule of devolution, when the property has already been taken absolutely by some one else, or whether the latter clause should be construed as one by way of defeasance falling under the recognised clauses or whether the latter clause on a proper interpretation, must be held to cut down the absolute estate conferred under the former clause, with a view that the intentions of the testator clearly manifested in the will could be effectuated The problem always has been to decide which side of the border line the latter clause should fall It may be useful at the outset to refer to the following statement of the law in *Raj Byrang Bahadur Singh* v *Thakurain Bakthraj Kuer*[1].

" These words it cannot be disputed, are descriptive of a heritable and alienable estate in the donee, and they connote full proprietary rights unless there is something in the context or in the surrounding circumstances which indicate that absolute rights were not intended to be conferred In all such cases the true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory

But it can be said without hesitation that it was not the intention of the testator to confer anything but a life estate upon Bhuj Singh in respect of the properties covered by the will The clause in the will imposing total restraint on alienation is also a pointer in the same direction In cases where the intention of the testator is to grant an absolute estate, an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on the ground of repugnancy, but where the restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word ' Malik' "

A distinction between a defeasance clause and the repugnant one is very often a nice one and the important test is to determine whether the predominent intention of the testator is to confer and maintain an absolute estate and then add limitations and restrictions in obvious derogation of the incidents of such an absolute ownership and estate conferred under the earlier clause But if the intention expressed or necessarily implied on reading all the clauses of the will, is to modify the absolute estate the absolute estate is to be given effect to as a life estate with a power of appointment In *Tiruchendur Sri Subramaniaswami Temple* v. *Ramaswami Pillai*[2], and others, affirming the Bench decisions of the Madras High Court in *Tiruchendur Subramaniaswami Temple* v. *Ramaswami Pillai*[3], the testator has stated in the will as follows

" I have bequeathed to my son Picha Pillai, the right to all my properties and moneys, *etc* , and he shall solely enjoy them If he or his son has no child, the said properties shall pass to Subramaniaswami at Tiruchendur "

1. (1953) 1 M L J 108 (S C) at pages 111 and 112 1952 S C J 655
2. (1950) 1 M L J 300
3. (1940) 2 M L J 510

The Privy Council held that the latter provision for the devolution of the property in case the son should die without issue, was not in any way intended to limit the character of the absolute estate clearly indicated in the will and that the latter provision was void as being repugnant

The gift over has been regarded by the decisions both in England and India as one circumstance indicative of the intention of the testator to cut down the absolute estate But that by itself is not conclusive and decisive. It is only one of the factors to be taken into account in construing the will as a whole At this stage reference may be made to the statement of the law in 39 Halsbury's Law of England, Lord Simonds Edition, 3rd Edition, page 1090, para 1611 ·

"An interest apparently in fee simple in real estate, or an interest in personal estate, may be made subject to defeasance, or may, on the context of the whole will, be cut down to a life interest or a life interest may be extended to an absolute interest, or may be reduced by the context to an estate until remarriage or other event It is, however, a settled rule of construction that a clear gift as not cut down by anything subsequent in the will which does not with reasonable certainty indicate the intention of the testator to cut it down"

It is necessary that the subsequent clause should be as clear as the first, that is the meaning of the words which cut down a prior gift should be clear, as the words which conferred it Dealing with the effect of a gift over preceded by a clear absolute gift, conferring absolute power of disposition, the law is stated in these terms in Halsbury's Laws of England, 3rd Edition, Lord Simonds Editions, Vol. 39 at page 1090, para. 1623 ·

" Where there is a clear absolute gift followed by words purporting to confer a power of disposition, with a gift over if the power is not exercised, the absolute gift takes effect and the gift over is inconsistent with it and is void

Thus, where personal estate is given, in terms which cover an absolute estate, to a named donee and then further interests are given merely after or on the termination of that donee's interest and not in defeasance of it, his absolute interest is not cut down and the further interests fail, and an absolute interest is not cut down by precatory words, unless these words create an imperative obligation

Where there is an absolute gift of property followed by a gift over of the property after the death of the donee, or after his death, without issue or without leaving children, or of that part of the property of which he shall not have dispossed, the absolute gift prevails, and the ultimate gift is repugnant and void It may, however, appear sufficiently clear on the construction of the will as a whole that a gift which is in terms absolute is in fact intended as a gift of a life interest only , and the construction is not prevented merely by the fact that the gift over is of 'whatever remains' or in similar terms When a will conferring an absolute interest is varied by codicil an intention may appear that the donee is to take a life interest or a life interest with a power of disposition If, there is a doubt as to what interest the donee takes, other provisions inconsistent with an absolute gift, such as a restriction on alienation, or a gift over on the donee disposing, or failing to dispose of the property, may show that he is to take a life interest only"

An examination of some of the cases referred to in the above statements of the law shows that in several cases, Courts have adopted an intermediate construction of construing a prior absolute gift as an estate for life with a power of appointment by deed or will and the subsequent limitation or bequest taking effect in case the power of appointment had not been exercised Even though for practical purposes, there is no distinction between an absolute estate and a life estate coupled with a power of appointment by will or deed, it is settled law that the two ideas are two distinct conceptions and that it is quite competent to a testator to confer a life estate with a power of appointment by a deed or will following it up by an independent or subsequent bequest, in case the first legatee dies without exercising the power of appointment It is sufficient to refer the decision of Mr Justice Venkataramana Rao in *Misnor Ananthasayana Naidu* v *Kandappa Naidu*[1], Reference may also be made to the statement of the law in Williams on Wills—Volume 1, page 495 at page 496 :

" A gift over in default of disposition by an absolute owner is void An absolute gift of property followed by a gift of so much of that property as the first donee shall not have disposed of is an absolute gift in the first instance and the gift over is void The main difficulty in these cases is that what is apparently an absolute gift in the first instance may by reason of subsequent provisions in the will be held to be cut down to a life interest, and the following are examples of such cases The gift is to cut down (1) where the gift at the death of the first donee of what remains of the estate can

1. (1940) 1 M L J 212 at 219.

be construed as a gift over of the residue after payment of debts ; (ii) if such an expression appears in a codicil so that an intention is shown to vary the absolute interest given by the will, the first donee will take a life interest, with a power of disposition either *inter vivos*, or by will, only, or generally, (iii) where there is a doubt as to what interest the first donee takes raised by inconsistent provisions in the will such as a restriction on alienation, or a gift over on the donee disposing or failing to dispose of the property "

It will be seen that in some of the cases, this construction of the clause as conferring an estate for life coupled with a power of appointment by a deed or will, would best effectuate the intentions of the testator in either case, when there is an alienation in pursuance of the exercise of the power of appointment or when the first legatee dies without alienating. In a case where the prior legatee alienates the property before his death, such an alienation has to be and is upheld in view of the fact that the absolute estate with powers of alienation has been conferred under the will, and in such a situation, there is nothing on which the latter clause could operate. On the other hand, if the first legatee dies without exercising the powers of alienation the intention of the testator again is effectuated by the legatees mentioned in the latter clause, taking the property as provided therein. On the other hand, if either of the extreme views is accepted *viz.*,

(*a*) the first clause being construed as creating an absolute estate and the latter clause being regarded as repugnant and therefore void , or

(*b*) the latter clause being construed as cutting down the prior absolute estate as a simple life estate with no powers of alienation, we will not be giving effect to both the clauses together, the intention of the testator would be defeated. In my opinion, to construe the latter clause as cutting down the prior absolute estate into a simple life estate with no powers of alienation woud be doing clear violance to the express language of the will and attaching decisive and outweighing importance to the latter clause, ignoring altogether the express powers of alieanation conferred in the earlier clause. Under the guise of adopting a rule of harmonious construction of reconciling all the clause together, there is no justification for adopting a construction which in its effect destroys the operative force of the clear words contained in the first clause. In such cases, the proper view would be to construe the prior estate as a life estate with a power of appointment, by deed or the will. Thus it will be seen in the setting in which the dispute arises, the alienation by the first legatee, assumes great importance and will have an important bearing on the task of giving effect to the intentions of the testator. In other words, a vital distinction exists between a case in which the controversy arises betwen the alienee from the first legatee as against the second legatee, and his successors-in-interest, and a case in which the controversy arises between the intestate heirs of the first legatee and the second legatee or his successors-in-interests.

Learned Counsel for the respondent has not drawn my attention to any case in which Courts have construed the second clause as having the effect of cutting down the prior clause as conferring a life estate simplicitor and at the same time holding any alienation made under the first clause, as invalid. All the cases cited by the learned Counsel are cases in which the first legatee died without making any alienation and the question that arose for conideration was whether the latter clause should be ignored as repugnant and void or whether the property should be taken by the heirs of the first legatee, or whether on his death, the legatees specified in the second clause can take the property. The controversy in all the cases cited by learned Counsel was only in this form. If this rule of construction of construing the earlier bequest as a life estate coupled with a power of appointment is borne in mind, it will be seen that many of the cases strongly relied upon by the learned Counsel for the respondent are easily distinguishable. The decsion in *Lakshmi Ammal* v. *Alaudin Sahib*[1], dealt with a case in which it was provided that after the death of the testator his wife was to enjoy the properties with full powers of alienation, gift, sale and with absolute rights, and that after the wife's death the two daughters should take properties with absolute rights. It was observed that taking both the dispositions to-

1. (1962) 2 M L J 187.

gether it should be held that the second clause containing the provisions for a gift over in favour of the daughters should be construed as cutting down the first absolute estate in favour of the wife into a limited one. An examination of the facts of that case shows that the testator died in 1931, one of the daughters died in 1941, and the widow in the year 1948. The main dispute turned upon the validity of the alienation made by the husband of the deceased daughter, acting as the guardian of their minor daughter. On a consideration of all the clauses this Court held that the predominent intention was to make a bequest in favour of the daughters and for the purpose of giving effect to that intention the absolute estate had to be cut down to a life estate. A reference to the decision shows that the will contained several features pointing to the conclusion. But the important point to notice is that the widow died without making any alienation and the question as to how the express provision in the will conferring an absolute estate on the widow could be given effect to in that specific form did not arise for decision.

The decision in *Thayalai Achi* v. *Kannammal*[1], recognises this principle that a legatee under the first clause shall take an absolute estate but that if she did not dispose of the property during her lifetime the property would pass to the legatee specified in the latter clauses.

The Bench decision in *Narayandas* v. *Arumughammal*[2], is again distinguishable on the same principle. In that case it was held that the second clause which was one of defeasance should not be rejected as repugnant but should be construed as cutting down the earlier absolute estate. That again was a case of the first legatee dying without alienating in terms of the absolute powers of alienation conferred on her. The main dispute centred round the question whether the bequests in favour of the daughters could be held to be valid, and not void as repugnant. To reiterate, the question as to how far a power of alienation expressed in unambiguous terms should be construed as conferring a simple life estate did not come up for consideration. In other words, cases which have taken the view that an absolute estate could in a proper outweighing compelling context be constued as a life estate, are besides the point when the instant case concerns the validity of an alienation made by the first legatee.

Reference may next be made to the decision of the Supreme Court in *Pearylal* v. *Rameswar Das*[3], in which the Court had to construe two apparently conflicting provisions. In that case a testator executed a will, a portion of which provided that on his death his wife and his adopted son will became Malik of all the properties, that the wife should live in the house and the adopted son should get all the proprietary rights just like the testator, and that no other person will have any right or claim to his properties. The adopted son predeceased the testator, and the wife executed a will bequeathing the property in dispute to her brother's grandson. The question arose whether the legatee under the wife's will got any title The argument that the wife got under the will a mere life estate without power of alienation was rejected by the Supreme Court. It is sufficient to refer to the following observations at page 1706 :

"If the argument of learned Counsel for the appellant be accepted, this Court would be rewriting the will for the testator and introducing words which were not there , it would be cutting down the meaning of the words which the testator designedly used to convey a larger interest to his wife. Where apparenty conflicting disposition can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of construction which does not create any such hiatus."

It must be noticed that this case turned more upon the question whether the bequest in favour of the adopted son was one of defeasance or a repugnant clause.

I shall next refer to the decision of the SupremeCourt in *Ramachandra* v. *Hilda Brite*[4], on which again strong reliance was placed by learned Counsel for the respon-

1. (1935) 68 M L J 707.
2. (1962) 1 M.L J 401.
3 (1964) 1 S C J 84 A I R 1963 S C 1703
4. (1964) 2 S C J 722 : A.I R 1964 S C 1323

dent. In that case the testatrix who was an Indian Christian executed a will and clause 3 (c) contained the bequest in dispute in favour of her eldest daughter and her male children That clause was in these terms

"3 (c) All kinds of movable properties that shall be in my possession and authority at the time of my death, that is all kinds of movable properties inclusive of the amounts that shall be got from others and the cash—all these my eldest daughter Saverina Sabina Coelho shall after my death enjoy and after her lifetime her male children also shall enjoy permanently and with absolute right (The rest of it is not very material and is omitted)"

Other clauses in the will contained other bequests in favour of other legatees but they contained restrictions on powers of alienation In execution of a decree obtained against this eldest daughter, Saverina Sabina, the property bequeathed to her was purchased. After the death of Saverina in 1946 the dispute arose between the Court auction purchaser on the one side and the widow and the daughter of one Denizone, one of the sons of Saverina aforesaid (the eldest daughter of the testatrix). The argument on behalf of the Court auction purchaser was that on a proper interpretation of the will, especially clause 3 (c), what was conferred upon Saverina was an absolute estate in the property, as a result of which the entire interest passed to her, that under the Court auction the purchaser had become the owner and that no right could be claimed by the plaintiffs claiming title through one of the sons of Saverina The High Court, reversing the view taken by the Courts below, held that on a proper interpretation of clause 3, Saverina, the eldest daughter, took only a life interest and this view was affirmed by the Supreme Court. Learned Counsel for the respondents placed considerable reliance upon the following observations of the Supreme Court at pages 1328, 1329 :

" This is on the principle that where property is given to *A* absolutely, then whatever remains on *A*'s death must pass to his heirs or under his will and any attempt to sever the incidents from the absolute interest by prescribing a different destination must fail as being repugnant to the interest created But the initial question for consideration is whether on a proper construction of the will an absolute interest in favour of Saverina is established It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will It is for this reason that where there is a bequest to *A* even though it be in terms apparently absolute followed by a gift of the same to *D* absolutely " on " or " after " or " at " *A*'s death *A* is *prima facie* held to take a life interest and *B* an interest in remainder, the apparently absolute interest of *A* being cut down to accommodate the interest created in favour of *B* In the present case if, as has to be admitted, the testatrix did intend to confer an absolute interest in the female children of Saverina the question is whether effect can or cannot be given to it If the interest of Saverina were to be held to be absolute no doubt effect could not be given to the said intention But if there are words in the will which on a reasonable construction would denote that the interest of Saverina was not intended to be absolute but was limited to her life only it would be proper for the Court to adopt such a construction, for that would give effect to every testamentary disposition contained in the will It is in that context that the words 'after her lifetime' occurring in clause 3 (c) assume crucial importance "

I am unable to consider this decision and regard these observations of the Supreme Court as an authority for the proposition in an unqualified form that in every case in which an absolute estate is followed by a bequest on or after or at death of the prior legatee the latter bequest would have the effect of cutting down the former absolute estate into a life estate without powers of alienation. There is nothing in the decision which supports the view that where the first legatee is conferred in express unambiguous language, powers of alienation, the alienation could be declared to be invalid by reason of a latter clause either by way of defeasance or by way of a gift over As observed earlier, cases of that kind stand in an entirely different footing governed by different principles altogether. The decision of the Supreme Court turned upon the particular language and features of the will in question. It is significant to note that the Supreme Court took the view that the word in clause 3 " shall enjoy permanently and with absolute right " apply only to the interest taken by the male children of Saverina (grandchildren of the testatrix) and

that the nature and the quantum of the interest conferred upon Saverina was significantly different In other words, on a construction of the will the Supreme Court took the view that the language of the will did not warrant the construction that an absolute estate was conferred upon Saverina with the result that there was no occasion for construing two apparently inconsistent provisions conferring an absolute interest under both In this connection it is necessary to refer to what the Supreme Court said with regard to the nature of the interest conferred upon Saverina at page 1327 :

"11 If the bequest by Saverina was ' to enjoy ' and the testatrix proceeds to add that after the lifetime of Saverina, her male issue were 'to have permanent and absolute rights in the same' the very contrast in the phraseology should lead one irresistibly to the conclusion that the nature of quantum of Saverina's interest was different from that of those who took after 'her lifetime ' Learned Counsel however laid special stress on the use of the word ' too ' or 'also' occurring towards the end of the clause as pointing to the ' enjoyment ' of Saverina being also ' permanent ' with abolute right We are however unable to read the word as having such a significance and as referring to the nature of Saverina's enjoyment as well, and in this conclusion we are supported by the text and the literal translation of the words u ed In our opinion the only relevant words in relation to the bequest to Saverina are that ' she shall after my death enjoy ' and the rest of the clause deals with what is to happen after her lifetime The dominant intention of the testatrix was to confer a permanent and absolute remainder on the male issue of her daughter after the lifetime of the first donee and the words used are apt and capable of supporting such a construction "

The Supreme Court had to deal with an integral composite provision in favour of both the daughter and her male issue and the controversy itself was whether by express language an absolute estate has been conferred upon the daughter in the first instance.

From the foregoing discussion it will be seen that the ratio of the decision of the Supreme Court rested upon the particular view of the will that no absolute interest was created in favour of the eldest daughter, and that the interest referred to under clause (3) was merely a terminable life interest I am therefore of opinion that this decision does not support the extreme contention put forward by learned Counsel for the respondent. Reading all the clauses of the will in Exhibit A-3 I am of the opinion that the intention of the testatrix is to maintain the absolute estate in favour of her husband The words ' with all powers of alienation " சர்வ சுதந்திர பாத்தியங்களுடன and சகல வைபவங்களுடன are words of widest amplitude The subsequent bequest in favour of the son would take effect only if the husband died without alienating the property But if he had alienated, the validity of the alienation must be upheld in view of the express terms of the will as otherwise the intention of the testatrix would be frustrated.

Lastly learned Counsel contended that under the earlier will the property had been given to the son, the daughter and daughter-in-law, but in the latter will the property had been exclusively given to the son with a mere provision for payment of Rs 300 each to the daughter and daughter-in-law, thereby indicating that the predominant intention of the testatrix was that the property should be taken by the son, and that in construing the will this aspect must be borne in mind Even so, the question still remains touching the validity of the alienation made by Anthonimuthu I am inclined to take the view that this provision of the gift over in favour of the son has been made by the testatrix not with a view to cut down the absolute estate but merely as a contingent provision that in case the husband should die without alienating the property it should be taken by the son The entire background of the case shows that the testatrix had supreme confidence in her husband and visualised the husband himself to make an equitable distribution of the property between the son, daughter and daughter-in-law This point therefore, does not advance the case of the respondent any further

In this view it is unnecessary to consider the argument based upon estoppe resting upon the conduct of the son, the plaintiff

The result is that the Second Appeal is allowed, the judgments and decrees of the Courts below are reversed and the plaintiff's suit is dismissed. The parties shall bear their own costs in the Second Appeal and the appellants are entitled to their costs in the Courts below No leave

V.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR JUSTICE P. KUNHAMED KUTTI.

Sri Sarada Mills Ltd. .. *Appellant**

v.

The Union of India owning and representing the Central Railway (by its General Manager, Bombay) and another .. *Respondents.*

Transfer of Property Act (IV of 1882), sections 6 (e) and 135—Contract Act (IX of 1872), section 41—Damage to goods entrusted to Railway for transport—Consignor realising the damages from Insurance Company after executing a deed of subrogation in its favour—Suit thereafter by consignor against Railway for damages in his own name—Maintainability—If barred by section 41 of Contract Act

Railways Act (IX of 1890), section 73—Goods booked under railway risk—Responsibility of Railway Administration.

Where damage is caused to goods entrusted to the Railway Administration for being carried from one destination to another, the fact that the consignor obtained payment for such loss from the Insurance Company with whom he had insured the goods after executing a deed of subrogation, will not disentitle the consignor to sue the Railway for damages in his own name though the Insurance Company could also well have been added as a plaintiff The contention that since the consignor is already compensated by the Insurance Company, section 41 of the Contract Act would be a bar to such a suit, is untenable That section has no application, where as in the present case, the insurer's payment is not in discharge of the obligation of the Railway to the consignor Further, section 41 of the Contract Act does not apply to obligations in the nature of an executory contract but only when the contract has in fact been performed Nor does the fact that the insurer has made good the loss prohibit the consignor from proceeding with the suit on that account. The contract is between the consignor and the Railway and if as a result of loss or destruction of the consignment, the Railway was liable to make good the loss to the consignor it would be no defence to the consignor's action that the insurer had paid to the consignor the amount for which the goods were insured.

The responsibility of the Railway Administration in respect of goods booked under railway risk is that of a bailee The Administration must, therefore, take as much care of the goods while under its control as a man of ordinary prudence would take of such goods and would be liable for the loss, destruction etc , if it happens by its default or negligence. It is not for the plaintiff, in the first instance, to prove, when loss or destruction occurs, as to how it happened He has, no doubt, to satisfy the Court that the Railway was negligent , but the duty of showing how the consignment was dealt with during transit lies on the Railway Administration as a matter within its special knowledge.

Appeal against the Decree of the Court of the Subodinate Judge of Coimbatore in Original Suit No 101 of 1957.

V. Narayanaswami and *K. Srinivasan*, for Appellant.

S. S Ramachandra Ayyar and *S K. Kumaraswami*, for Respondent.

The Judgment of the Court was delivered by

Kunhamed Kutti, J.—The plaintiff, Sri Sarada Mills Limited, whose suit for damages against the Union of India, as owning and representing the Central and Southern Railways, was dismissed by the Court below, is the appellant They had consigned through their agents Ranjit Ginning and Pressing Factory Ltd , 100 bales of F P Cotton from Nagpur to Podanur under a railway receipt issued by the Central Railway (the first defendant). The goods had to pass through several stations along the two railways, Central and Southern before it arrived at Podanur, and when it arrived 87 bales out of 100 were found burnt and charred and 13 bales were found loose and short. The plaintiff applied for open delivery and the railway authorities at Podanur got the damage surveyed, and issued a certificate of damage and shortage But when the plaintiff made a claim for damages the Chief Commercial Superintendent, Southern Railway, informed them that the consignment was involved in a fire accident at Sirpur, Kagaznagar, on the Central Railway, that the cause of the fire was unknown and that the Railways were not liable for the damages caused to the goods as there was no negligence or misconduct on their part. The plaintiff, on the other hand, had alleged that the damage and shortage were occasioned only by the acts and negligence on the part of the administration and misconduct of the employees and they were bound in law to indemnify for the loss sustained by the

* Appeal No. 129 of 1961. 4th January, 1966.

plaintiff The plaintiff, therefore, instituted the suit on the above allegations when the second defendant-railway in its written statement (which was adopted by the first defendant-Railway) further stated that a committee of enquiry, constituted for the purpose of finding out the cause of the fire had found that the cause of the fire was unknown, that the certificate of damage and shortage was not final or conclusive or exempted the plaintiff from proving the extent of damages suffered by the Mills and that the plaintiff, having realised damages from the Insurance Company, had no right to claim any amount from the defendants

The contentions raised by the defendants gave rise to as many as seven issues. The learned Subordinate Judge, who tried the suit, had before him the evidence of two witnesses examined on the side of the plaintiff, one on commission at Nagpur and the other before the Court, and the testimony of as many as 25 witnesses, 18 examined on Commission, 15 at Nagpur, 3 at Hyderabad and 7 before the Court A number of documents were also before the Court marked before the Commissioners and before it On a consideration of the entire evidence in the light of the case-law, the learned Subordinate Judge was inclined to hold, on issue 2, that the fire which caused loss to the goods of the plaintiff was not due to any cause beyond the control of the defendants and, on issue 3, that the damage was due to the negligence of the defendants He further found that the damages caused to the plaintiff by the fire accident was only to the tune of Rs 15,534 but the plaintiff had no right to file the suit since it had already realised a sum of Rs 32,254-6-9 from the Indian Globe Insurance Company, with whom the goods in question had been insured, on executing a letter of subrogation, with the result he dismissed the suit directing the parties to bear their respective costs

Mr Gopalaswami Iyengar for the appellant urged before us that a right to sue for damages for breach of contract is only a bare right to sue which cannot be assigned and the learned Subordinate Judge was wrong in concluding that section 6 (*c*) of the Transfer of Property Act is subject to the provisions of section 135 (4) of the Act He also contended that a right of subrogation will not entitle the Insurance Company to enforce the right in its own name as a deed of subrogation could not amount to any assignment of the subject-matter of insurance , but could give the insurer only what they would have under section 135-A (3) of the Transfer of Property Act

Subsequent to the accident, the plaintiff-Mills had received from the Insurance Company the sum of Rs 32;254-6-9 But it was contended before the learned Subordinate Judge that though the Insurance company has a right of subrogation under the law of Insurance, it could not sue in its own name and it was obligatory for the assured to sue for damages for the purpose of making it over to the Insurance Company Certain rulings of the Calcutta High Court were relied on in support of this contention The learned Subordinate Judge, however, construed the language of Exhibit A-9, the letter of subrogation executed by the plaintiff, as having the effect of a transfer in favour of the Insurance Company of the right to maintain an action against the Railway Administration for damages and relying on sub-section (4) of section 135-A held that in the face of the aforesaid sub-section, it cannot be contended that the transfer to the Insurance Company of the right to sue the railway Administration is not valid In this view, he held that the plaintiff has no right to file the suit, as it had admittedly realised the amount from the Insurance Company as per the receipt Exhibit A-8 after executing the letter Exhibit A-9. This letter read

> " We hereby assign, transfer and abandon to you all our rights against the Railway Company or other persons whatsoever caused or arising by reason of such damage or loss and grant you full power to take and use all lawful ways and means in your name and otherwise at your risk and expense to recover the said damage or loss, and we hereby subrogate to you the same right as we have "

Under section 6 (*e*) of the Transfer of Property Act, a mere right to sue cannot be transferred But this provision cannot affect section 135-A of the Act relating to assignment of rights under a policy of Marine Insurance, so that where a policy of Marine Insurannce has been assigned so as to pass the beneficial interest therein,

the assignee of the policy is entitled to sue thereon in his own name and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected Sub-section (2) of this section deals with subrogation of the insurer to all the rights and remedies of the insured where the insurer pays for the total loss of the subject-matter insured and sub-section (3) deals with such right when the insurer pays for the partial loss After the amendment in 1944, section 135 of the Act enabled every assignee by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment to have all rights of suit transferred and vested in him as if the contract contained in the policy had been made with himself

It is these provisions coupled with section 41 of the Contract Act that are relied on for the Railways to sustain the judgment of the learned Subordinte Judge. The argument of the learned Counsel for the Railways is that the Insurance Company having been subrogated became a transferee in respect of the rights which the plaintiff could have and enforced and the plaintiff having accepted performance from the said company, it cannot maintain this suit and the party competent to sue is the Insurance Company. The ruling in *Alliance Insurance Company* v. *The Union of India*[1], lends support to the position contended for by the learned Counsel. In that case, an insurer who had paid for a total loss of an apportionable part of some goods carried for transit by land by a Railway Administration was held by Renupada Mukerjee, J , to be competent to maintain a suit in his own name against the carrier for reimbursement of the amount paid to the insured for the loss It was further held in this case that under section 92 of the Transfer of Property Act, a subrogee could enforce his right by a suit without using the name of the mortgagee whose mortgage he has redeemed and that a subrogee under section 135-A (2) of the Transfer of Property Act should not be placed in a more disadvantageous position than a subrogee under section 92 of the Act. According to the learned Judge, if any doubt remained about the right of suit of an insurer under section 135-A (2) of the Transfer of Property Act, it is dispelled by sub-section (4) which makes clause (*e*) of section 6 inapplicable to all the sub-sections of section 135-A. He pointed out that though clause (*e*) of section 6 of the Transfer of Property Act provides that a mere right to sue which includes a personal right of action cannot be transferred, by removing this bar, sub-section (4) of section 135-A makes a deliberate departure from the English rule of procedure which lays down that an insurer who pays for a total loss cannot sue independently in his own name.

In *Textiles and Yarn Private Ltd.* v *I. N. Steamship Company*[2], which was a suit for recovery of damages on the Original Side of the Calcutta High Court for loss of goods in course of transit from Madras to Calcutta by sea in a steamship called "*Swarathna*", Mitra, J., held that the insurer cannot maintain an action in his own name although there is subrogation of the claims of the insured unless there is an assignment of the claim by the insured in favour of the insurer The learned Judge referred to *Alliance Assurance Co , Ltd* v *Union of India*[1]; but after adverting to the *Indian Trade & General Insurance Co , Ltd* v. *Union of India*[3], and *Periyamianna Marakkayar* v. *Banians & Co*[4], and the observation of the Judicial Committee in *King* v. *Victoria Insurance Co , Ltd.*[5], that subrogation by act of law would not give the insurer a right to sue in a Court of law in its own name, observed :

"In my view, the effect of the decisions discussed above is that the insurer cannot maintain an action in his own name although there is subrogation of the claims of the insured in his favour In order to entitle him to maintain an action in his own name there must be assignment of the claim by the insured in favour of the insurer"

The learned Judge also considered section 41 of the Indian Contract Act in the context of the plaintiff's claim and observed .

1. (1958) 62 Cal W N. 539.
2. A.I R. 1964 Cal. 362.
3. A.I.R. 1957 Cal. 190.
4. (1926) I L R. 49 Mad 156.
5. (1896) A.C. 250.

"The plaintiff's right to compensation for short delivery arises from the contract for carriage of goods The Bill of Lading lays down conditions on the fulfilment of which compensation for short landing or non-delivery is payable by the defendant The oral evidence shows that the plaintiff has recovered compensation from the insurer The learned Advocate for the plaintiff has also admitted that his client has recovered compensation claimed in the suit from the insurer That being the position, section 41 of the Indian Contract Act is attracted and this suit is not maintainable by the plaintiff The provisions of section 41 are a clear bar to a suit by a promisee if he accepts performance of the promise from a third person That is precisely what has happened in this case The plaintiff has accepted performance of the promise to pay compensation from the insurer and cannot, therefore, enforce the same claim against the defendant"

It is on the above finding that the plaintiff's suit was dismissed by the learned Judge. This part of the judgment is undoubtedly in favour of the contention urged for the Railways.

Sri Gopalaswami Iyengar, however, relied on *Chandrasekharalingam* v. *Nagabhooshanam*[1], where in Ramesam, J, held that the transfer of a claim to past mesne profits is invalid under section 6 (*e*) of the Transfer of Property Act That was a case where a person who was the owner of the property, at the time it was trespassed upon and to whom the trespasser became liable for its mesne profits, filed suits to recover mesne profits after such profits were intended to be transferred by the sale deed in favour of the vendee. The vendee did not sue for these profits and as per the understanding between the vendor and the vendee, the vendor was to sue for these profits Actually, it was the reversioner who brought the suits and Ramesam, J, on a consideration of the case-law, held that he was entitled to maintain the suit even after a valid assignment of the claim to such profits observing that such a suit may be for the benefit of the assignee and he may be made to hand over the amount when collected to the assignee The learned Judge followed this Court's ruling in *Seethamma* v. *Venkataramaniah*[2], and was not inclined to share the doubts of Seshagiri Iyer, J, in *Venkatarama Iyer* v. *Ramaswami Iyer*[3]. At page 344, Ramesam, J., observed :

"The defendants having incurred an obligation in favour of the present plaintiff, the fact that the plaintiff's right was transferred to some transferee ought not to make the obligation any the less It may be that in such a case, the defendants ought to be protected from a double action Of that there is no fear in the present litigation It seems to me that even if the assignment is valid, the right of action originally residing in the assignor has not ceased. It is true that section 130 of the Transfer of Property Act says that where an actionable claim is transferred, all the rights and remedies of the transferor are transferred I do not deny this All that I say is that the transferor may maintain an action and afterwards hand over the amount when collected to the transferee The whole of Chapter VIII of the Transfer of Property Act is intended to enable the transferees of actionable claims to maintain actions on the assignments and to get rid of the difficulties in the English Law where, for sometime, assignees could not maintain an action at all and afterwards they were allowed to maintain action in the name of the assignor ; but I do not think this chapter is intended to lay down that the transferor himself cannot maintain an action for the benefit of the transferee. . . "

We share this view and consider that on a similar principle, it cannot be said that the plaintiff is not entitled or competent to institute the suit though in our view the Insurance Company could also well have been added as a plaintiff

The responsibility of the Railway Administration in respect of goods booked under railway risk is that of a bailee The administration must, therefore, take as much care of the goods while under its control as a man of ordinary prudence would take of such goods and would be liable for the loss, destruction etc , if it happens by its default or negligence. It is not for the plaintiff, in the first instance, to prove, when loss or destruction occurs, as to how it happened He has, no doubt, to satisfy the Court that the defendant-administration was negligent , but the duty of showing how the consignment was dealt with during transit lies on the Railway Administration as matter within its special knowledge.

In the case on hand, the learned Subordinate Judge has found that the fire which caused loss to the goods was due to the negligence of the defendant and the learned Counsel for the Railways was not able to presuade us, with reference to the evidence in the case, to take a different view The fire appears to have continued for about four hours in the wagon and, having regard to the running time between

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1. (1927) 53 M L J 342.
2. (1912) 25 M.L.J. 410 : I.L.R. 38 Mad. 308.
3. (1918) 40 M.L.J. 204 . I L.R. 44 Mad. 539.

Makudi and Sirpur-Kagaznagar, there can be no doubt that it should have taken place after the train left Makudi and before it reached Sirpur Town. No one appears to have noticed the fire at the latter station. This was done only at Sirpur-Kagaznagar The burden is on the administration to show how the consignment was dealt with during transit and when that has not been done to the satisfaction of the Court, we are entitled to presume negligence and that is the finding come to in this case We accept this finding

The result is that, the Union Government representing the Railways are liable for the damage. The contention of the learned Counsel, as we understand it, appears to be that since the plaintiff had already been compensated by the Insurance Company, section 41 of the Contract Act applied and, therefore, the plaintiff can have no further recourse against the Railways The cases relied on for the Railways appear to make a distinction between mere subrogation and assignment and take the view that in the case of an assignment wherein a promisee—in this case, the plaintiff—accepts performance of the promise from a third person, like the Insurance Company, he cannot afterwards enforce it against the promisor, the Railways In our opinion, section 41 has no application to this case because the insurer's payment is not in discharge of the obligation of the Railway to the plaintiff, and does not therefore, preclude the plaintiff from maintaining a claim against the Railways Further, section 41 does not apply to obligations in the nature of an executory contract but only when the contract has in fact been performed Vide *Har Chandi Lal* v *Sheoraj Singh* [1] Nor does the fact that the Insurance Company has made good the loss, prohibit the plaintiff from proceeding with the suit on that account. The contract is between the plaintiff and the defendant and if as a result of loss or destruction of the consignment, the defendant was liable to make good the loss to the plaintiff, it would be no defence to the plaintiff's action that the Insurance Company had paid to the plaintiff the amount for which the goods were insured—Vide *Parsram Parumal* v *Air India Ltd* [2]. We are, therefore, of opinion that the dismissal of the suit for the amount found due and payable by the defendant cannot be upheld

The decree of the learned Subordinate Judge dismissing the suit is accordingly set aside and the suit is decreed for Rs 15,534 and pro-costs both in the Court below and in this Court against the defendant.

V K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI AND MR. JUSTICE K S. VENKATARAMAN

S. Vanchesan and others .. *Petitioners**

v.

Messrs. Brahmayya & Co., and others .. *Respondents.*

Constitution of India (1950), *Article* 133 (1) (a) *and* (c)—*Misfeasance application under section* 235 *of the Companies Act*, 1913, *against directors and officers of a company in liquidation—Decree passed against them by trial Court varied in respect of some and confirmed in respect of others by appellate Court—Appellate decree not one of affirmance—Leave under Article* 133 (1) (a) *against any part of appellate decree—Must be granted on valuation test being satisfied—Proposed appeal by one of the officers not satisfying valuation test—Question involved in such appeal common to other appeals in which leave has been granted—If can be certified as fit for appeal under Article* 133 (1) (c)

Civil Procedure Code (*V of* 1908), *Order* 45, *rule* 4—*Applicability.*

Constitution of India (1950), *Article* 133 (1)—*Companies Act* (*VII of* 1913), *section* 235—(*Obiter*) *Question whether a Secretary or an Assistant Secretary or an Accountant of a bank is an officer for the purpose of section* 235 *of Companies Act—If, a substantial question of law*

An application was filed under section 235 of the Companies Act, 1913, against the respondents by the Official Liquidators in the liquidation of a certain bank The respondents were some of the

1. (1916) 32 M L J 244. L R 44 I.A 60 I.L R 39 All 178 (P C)
2. (1954) 56 Bom L R 944 at 954

* S C P Nos 143, 152 and 160 of 1964 in O.S.A. Nos 17, 8 of 1961 and 62 of 1960 respectively. 22nd October, 1965.

Directors and Officers of the said bank Various acts of misappropriations and misfeasance were alleged and the several respondents were sought to be made liable in respect of them The trial Court (High Court on its Original Side) fastened a joint and several liability of Rs 32,000 on respondents 5 and 8 (Directors) and as far as respondent 9 (another Director) was concerned, he was held not liable for any amount Dealing with respondents 11 to 13 (Officers) the trial Court held that respondent 11 was liable for a sum of Rs 40,400 respondent 12 for Rs 35,950 and respondent 13 for a sum of Rs 13,450 Not being satisfied by the decree of the trial Court the Official Liquidators filed an appeal against respondents 5, 8 and 9 Respondents 11, 12 and 13, in their turn, filed appeals questioning the liability fastened on them The appellate Court (a Division Bench of the High Court) split up the joint and several liability fixed on respondents 5 and 8 and they were made severally liable for Rs 15,000 and Rs 25,000 respectively The appeal against respondent 9 was dismissed The appeals filed by respondents 11 to 13 were also dismissed Thereupon the Official Liquidators filed an application under Article 133 (1) (*a*) of the Constitution of India for leave to appeal to Supreme Court against the decree of the Division Bench in so far as it concerned respondents 5, 8 and 9 Respondents 11 to 13 filed similar applications under Article 133 (1) (*a*) against the decree passed against them On the question whether leave should be granted,

Held, there was only one decree of the trial Court and only one decree of the appellate Court, that the decision of the appellate Court was not one of affirmance of the trial Court's decree and as the value of the subject-matter in dispute in the Court of first instance and in the proposed appeals to Supreme Court was more than Rs 20,000 in the case of the appeals proposed by the Official Liquidators and respondents 11 and 12, leave to appeal to Supreme Court should be granted to them under Article 133 (1) (*a*)

In determining the question as to whether the appellate decree affirmed the decision of the trial Court, the appellate decree must be considered as a whole in relation to the decision of the trial Court similarly considered as a whole If there is a variation made in the appellate decree it would not be a decree of affirmance and this is not affected by the extent of variation made

T Rajaram v *Radhakrishnayya*, (1962) 1 S C J 568 (1962) 1 M L J (S C) 248 (1962) 1 An W R. (S C) 248 A I R 1961 S C 1795, followed

In the case of respondent 13 the proposed appeal to Supreme Court could be valued only at Rs 13,450 and his appeal cannot be consolidated with the appeals of respondents 11 and 12 under the provisions of Order 45, rule 4 of the Civil Procedure Code as that provision cannot directly apply to separate matters in the same misfeasance application Nevertheless, since the question raised in the appeal of respondent 13, namely, whether he is an officer within the meaning of section 235 of the Companies Act, 1913, was the same as respondents 11 and 12 were raising in their respective appeals for which leave should be granted, it would be in consonance with justice to say that the case of respondent 13 would be fit one for appeal under Article 133 (1) (*c*) of the Constitution of India

Obiter The question whether a Secretary or an Assistant Secretary or an Accountant of a bank would be an officer within the meaning of section 235 of the Companies Act, 1913, is a substantial question of law for the purpose of Article 133 (1) of the Constitution of India as there does not seem to be any direct decision of the Supreme Court or the Federal Court or the Privy Council on this point.

Petitions under sections 109 and 110 and Order 45, rules 2, 3, 7 and 8 of Civil Procedure Code and Article 133 (1) (*a*) to (*c*) of the Constitution of India praying that in the circumstances stated in the Memorandum of Grounds of Appeals to the Supreme Court of India, the High Court will be pleased to grant leave to the petitioners to appeal to the Supreme Court of India against the Judgment and Decree of the Hon'ble Mr S Ramachandra Iyer, Chief Justice, and of Mr. Justice Venkataraman, dated 1st May, 1963* and passed in O. S A. Nos 17 and 8 of 1961 and O S A No. 62 of 1960 respectively preferred against the Judgment and Decree of the Hon'ble Mr Justice Subrahmanyam, dated 16th October, 1959, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court of Judicature at Madras in Application No 2826 of 1950 in O P. No. 192 of 1947.

K Sarvabhuman, for Petitioner in S C P. No. 143 of 1964.

S Swaminathan, for Respondent in S C P No. 143 of 1964, for Petitioners in S. C P. No 152 of 1964 and for Respondents in S C P No 160 of 1964.

R Gopalaswami Iyengar, *K. Srinivasaraghavachari*, *M. S Venkatarama Iyer* and *A. Balasubramaniam*, for Respondents 1 to 3 in S C.P No. 152 of 1964.

S. Narasinga Rao, for Petitioner in S C.P No. 160 of 1964.

The Judgment of the Court was delivered by

Venkataraman, J—These are applications for leave to appeal to the Supreme Court against a common judgment and decree dated 1st May, 1963 passed by a Bench of this Court in appeals preferred against the judgment and decree dated 16th October, 1959 passed by Subrahmanyam, J , in Application No. 2826 of 1950. That was an application under section 235 of the Companies Act, 1913, by the

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* Reported in *Ganesan* v *M/s. Brahmayya & Co*, (1964) 1 M L J 405 (1964) 1 Comp L J 262.

Official Liquidators in the liquidation of the Hanuman Bank Ltd., Tanjore. The respondents to the application were the Directors (Respondents 1 to 10), officers (Respondents 11 to 29) and the Auditor (Respondent 30) of the company. Various acts of misappropriation and misfeasance were alleged and the several respondents were sought to be made liable in respect of several transactions. Subramanyam, J., found that there were several misappropriations, irrecoverable advances and unauthorised declaration of dividend out of capital In respect of them all, the Managing Director, K V Krishnamurthy Iyer (2nd respondent in the misfeasance application) (hereafter the parties will be referred to only with reference to their position as repondents in that application) was held uniformly liable But, so far as the other directors were concerned the learned Judge held only some of them liable and that too only to a limited extent We are now concerned with three of the directors who were respondents 5, 8 and 9 (Dr T S Varadachari, K V. Ganapathisubramania Iyer and A N Srinivasa Iyer) So far as S. Varadachari and Ganapathisubramani Iyer are concerned, the learned Judge fastened a liability of Rs. 10,000 on them jointly and severally with some of the other directors as compensation for advances made subsequent to 7th March, 1947 (*vide* clause 27 (*a*) of the decree) He similarly fastened a liability of Rs 22,000 in respect of wrongful payment of dividend out of capital On 7th March, 1947 there was a meeting of the Board of Directors at which the several misappropriations and irregularities were discussed The learned Judge held that the Directors must therefore be held responsible for the irrecoverable loans advanced after that date and the wrongful payment of dividends after that date But in respect of the misappropriations and other irregularities prior to 7th March, 1947, the learned Judge held that the Directors in question could not be held liable, because they did not have sufficient notice of the misappropriations and irregularities So far as the 9th respondent A. N. Srinivasa Iyer was concerned, the learned Judge held him not liable because he had retired on 28th December, 1946.

Among the persons who were arrayed as respondents 11 to 29 before the learned Judge, we are now concerned only with three, namely, respondent 11 V Ganesa Iyer, respondent 12 S Vanchesan, and respondent 13 R Appaswami Iyer. The learned Judge held that each of them must be considered as an officer of the company within the meaning of section 235 of the Act along with the Managing Director and since they also aided the misappropriation of the funds and the irregular advances, they must also be held liable at least to some extent Respondent 11 was held liable for a sum of Rs 40,400 under clauses 5, 6, 7, 8 and 11 of the decree Respondent 12 was found liable for a sum of Rs. 35,950 under clauses 5, 6, 9, 10 and 11 of the decree. Respondent 3 was held liable for a sum of Rs. 13,450 under clauses 5 and 6 of the decree.

The Official Liquidators filed O.S.A. No 8 of 1961 against four of the Directors, namely, respondents 5, 7, 8 and 9, contending briefly that they should be made liable even in respect of the misappropriations, and irrecoverable advances made prior to 7th March, 1947 and that their liability after 7th March, 1947 should be fixed at a greater amount than Rs 10,000 Ganesa Iyer, the 11th respondent, filed O.S.A No 62 of 1960 questioning the liability fastened on him Vanchesan and Appaswami Iyer (respondents 12 and 13) similarly filed OIS A No. 17 of 1961. The appeals were heard together. In the appeal of the Official Liquidators against the Directors, the Division Bench agreed with Subrahmanyam, J, except in the case of Dr. T. S. Varadachari, the 5th respondent, that there were not sufficient materials before the meeting of 7th March, 1947 to put the directors on notice of the misappropriations and irregular advances. So far as the 5th respondent Dr. T. S. Varadachari was concerned, however, the Bench pointed out that there was some material which put him on notice of the misappropriations and irregularities. In respect of such advances prior to 7th March, 1947, a liability of Rs. 10,000 was fastened on Dr. T. S Varadachari, under clause 1 of the decree dated 1st May, 1963. In respect of the irregular advances made after 7th March, 1947, the liability of Rs. 10,000 which had been fixed by Subrahmanyam, J, under clause 27 (*a*) of his decree was increased to a sum of Rs. 18,758 But instead of a joint and several

liability, this liability was split up. Respondent 5 Dr. T. S. Varadachari was directed to pay Rs. 2,000, respondent 7 Rs. 6,758 and respondent 8 Ganapathi-Subramania Iyer Rs. 10,000. The liability of Rs. 22,000 fixed by Subramanyam, J., under clause 27 (*b*) of his decree for wrongful payment of dividend out of capital was confirmed, but the joint and several liability was split up Respondent 5 Dr T. S Varadachari was directed to pay a sum of Rs. 3,000, respondent 7 Rs. 4,000 and respondent 8 Rs. 15,000 In other respects, the decree of Subrahmanyam, J , was allowed to stand This meant that the Official Liquidator's appeal was dismissed so far as the 9th respondent A N Srinivasa Iyer was concerned. The appeals O S A. No 62 of 1960 (of Ganesa Iyer the 11th respondent) and O S.A. No. 17 of 1961 (of the 12th and 13th respondents) were dismissed.

S C P. No 152 of 1964 has been filed by the Official Liquidators against respondents 5, 8 and 9 (Dr T. S Varadachari, Ganapathisubramania Iyer and A N. Srinivasa Iyer) on the ground mainly that they should be held liable even for the misappropriations and advances made prior to 7th March, 1947 and that a greater liability should be fixed on the respondents 5 and 8. S C P No 143 of 1964 has been filed by respondents 12 and 13 (Vanchesan and Appaswami Iyer) S C P. No 160 of 1964 has been filed by the 11th respondent (Ganesa Iyer). All these applications have been filed only under Article 133 (1) (*a*) of the Constitution and that raises two questions, (1) whether the value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal to the Supreme Court was and is not less than Rs. 20,000, and (2) whether the judgment or decree appealed from affirms the decision of Subrahmanyam, J., and if so, whether the appeal concerned involves some substantial question of law. For answering these questions, it is sufficient to refer to the decision of the Supreme Court in *T. Rajaram* v *Radhakrishnayya*[1].

The appellant in the Supreme Court, Tirumalachetti Rajaram filed a suit for partition in the Sub-Court of Chittoor for his half-share in some properties which once belonged to the joint family consisting of himself and his father, and he impleaded his father and several alienees from him. He contended that the alienations effected by his father and the sales held in execution proceedings against his father were not binding on him The trial Court rejected his contention *in toto* and dismissed the suit On appeal, the High Court of Madras reversed the trial Court's decree in respect of alienations of some of the items and held that those alienations did not bind the appellant's share. A preliminary decree was accordingly passed in his favour in respect of the said items. But the rest of the decree passed by the trial Court was confirmed. The appellant applied to the High Court for a certificate under Article 133 (1) of the Constitution. The application was rejected on the ground that the decree sought to be appealed from was one of affirmance and there was no substantial question of law raised by the proposed appeal. Against that an appeal was taken to the Supreme Court The Supreme Court held that the decree of the High Court was not one of affirmance of the trial Court and since the valuation test was satisfied there was a right of appeal to the Supreme Court, even though no substantial question of law was involved The argument which had prevailed in the High Court in refusing the certificate was that the appeal proposed to the Supreme Court related only to some of the items of properties and in respect of them, both the trial Court and the High Court had agreed that the alienations and sales bound the appellant Their Lordships of the Supreme Court observed that this view was wrong and that though several items of properties were involved and several different defendants were in possession of the properties, there was only one decree of the High Court and since that decree had varied the decree of the trial Court, the decree was not one of affirmance and that it was immaterial that the variation was in favour of the appellant. At page 1798, they observed :

" The normal, natural and reasonable construction to place on the first part of the relevant clause is to hold that it refers not merely to that part of the decree which is sought to be challenged in the

1 (1962) 1 S C J 568 (1962) 1 M L J (S C) 1795 (1798). 248. (1962) 1 An W R 248 A I R 1961 S C

appeal but the entire decree from which the appeal arises or the decree giving rise to the appeal On this construction the clause "appealed from" is not a clause of limitation It is merely a descriptive clause and it describes the decree as one from which the appeal arises If that be so, in determining the character of the decree it would be necessary to take the decree as a whole and enquire whether it is a decree of affirmance or not "

It was urged before their Lordships that this construction would be inconsistant with the provision made by Article 133 (1) (*a*) in regard to the value of the subject-matter in dispute. In rejecting this argument, their Lordships observed :

" The argument is that if for determining the value of the subject-matter it is necessary to consider only that part of the decree and subject-matter which are actually proposed to be brought to this Court in appeal, in interpreting the word " decree " in the relevant clause a similar approach should be adopted and only that part of the decree should be considered which is proposed to be brought to this Court in appeal We do not see the materiality of this consideration nor even its relevance The test prescribed by Article 133 (1) (*a*) is an independent additional test and its effect has to be judged by interpreting the words used by the relevant clause If the said clause refers to the amount of the value of the subject-matter still in dispute on appeal quite plainly we must take into account only the subject-matter in dispute in appeal and nothing more The words used in this connection are clear and unambiguous but tney cannot reasonably control the meaning of the word " decree " in the relevant clause which provides for an additional and an independent condition "

At page 1801 they say :

" We would accordingly hold that in determining the question as to whether the appellate decree passed by the High Court affirmed the decision of the trial Court the appellate decree must be considered as a whole in relation to the decision of the trial Court similarly considered as a whole That is the proper approach in applying the test of affirmance If there is a variation made in the appellate decree in the decision of the trial Court it is not a decree of affirmance and this is not affected either by the extent of the variation made or by the fact that the variation is made in favour of the intending appellant and not against him "

At page 1803 again, after referring to the decision of the Privy Council in *Annapurnabai's case*[1], their Lordships observed

" that subsequently became the starting point of elaborate discussion in which legal subtlety was pressed into service and distinction was made between action arising on a single cause of action and giving rise to a single claim and actions in which different causes of action were combined against different persons and different reliefs were claimed "

Their Lordships of the Supreme Court dispproved of this distinction.

Now, applying this test laid down by their Lordships, it is clear that in this case there was only one decree of Subrahmanyam, J., and only one decree dated 1st May, 1963 of the Bench of this Court and this latter decree was not one of affimance of the trial Court's decree. In S C P Nos 152 and 160 of 1964 the test of valuation is also satisfied, because the value of the subject-matter in dispute in the Court of first instance and in the proposed appeal to the Supreme Court was and is more than Rs. 20,000. In S C P. No. 143 of 1964 the test of valuation is satisfied in the case of the 12th respondent Vanchesan, but is not satisfied in the case of the 13th respondent Appaswami Iyer, because his liability was fixed by Subrahmanyam, J., at Rs 13,450 and that was affirmed by the Bench and that is the value of the subject-matter of his proposed appeal to the Supreme Court. This means that the certificate has to be granted in S C.P. Nos 152 and 160 of 1964 and so far as Vanchesan is concerned in S.C.P. No. 143 of 1964: we shall deal with the case of Appaswami Iyer later.

Though the above conclusion seems to clearly follow from the decision and observations of the Supreme Court in the decision referred to *T Rajaram* v. *Radhakrishnayya*[2], arguments to the contrary have been advanced before us and it is sufficient to deal with them briefly. Sri M. S Venkatarama Iyer, learned Counsel appearing for Ganapathisubramania Iyer, 8th respondent, resists the grant of the certificate in S C P. No. 152 of 1964 by contending that so far as his client is concerned, the decree of this Court is one of affirmance of the decree of Subrahmanyam, J., and that it is not urged by the Official Liquidators that any substantial question of law is involved. It will be seen that so far as Ganapathisubramania Iyer is concerned,

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1. L R 51 I A 319 I L R 51 Cal 969 248 (1962) 1 An.W.R. (S C.) 248. A.I R 1961
2 (1962) 1 S C J 568. (1962) 1 M L J. (S C) S C 1795

Subrahmanyam, J., fixed a joint and several liability of Rs. 10,000 on respondent 8 and some others under clause 27 (*a*) of his decree in respect of advances made subsequent to 7th March, 1947, and a joint and several liability of Rs. 22,000 under clause 27 (*b*) of the decree for wrongful payment of dividend out of capital The Bench fixed his liability individually at his request and confined it to Rs 25,000, namely, Rs 10,000 in respect of advances made subsequent to 7th March, 1947 and Rs. 15,000 in respect of wrongful payment of the dividend. Sri M. S Venkatarama Iyer urges that the Bench merely gave his client some equitable relief by making him individually liable for a smaller amount than Rs 32,000 and that it would only be a case of affirmance He relies on the observations of the Supreme Court in the case above referred to at page 1804 where they say :

> " Before we part with this appeal we would like to make it clear that if an appellate decree confirms the decision of the trial Court but merely makes a variation in regard to the order as to costs such a variation would not affect the character of the decree which would in law amount to a decree of affirmance, whether the variation as to costs is made in favour of one party or the other The position with regard to interest, however, is different , for instance, in regard to a claim for interest before the date of the decree which is a part of the dispute between the parties if the appellate Court makes a variation in respect of the award of interest that would affect the character of the appellate decree Unlike the order of costs which is entirely in the discretion of the Court under section 35 of the Civil Procedure Code an order as to interest which the Court can make under section 34 of the Code forms part of a dispute between the parties, and in that sense if a variation is made in regard to it it is an integral part of the decision or the decree In this connection it may also be necessary to make it clear that if the appeal Court makes a variation in the decision of the trial Court either because a concession has been made in that behalf or the variation has been obtained by parties by consent or a part of the subject-matter covered by the decree has been withdrawn such variation cannot affect the character of the appellate decree The principle of affirmance on which the provision rests postulates either affirmance or variation by the appeal Court as an act of adjudication and that necessarily means the decision of the appeal Court on the merits "

Learned Counsel says that the Official Liquidators practically agreed to the Bench fixing the liability of Ganapathi Subramania Iyer individually at Rs. 25,000.

These contentions of the learned Counsel are untenable. For one thing, on the test laid down by the Supreme Court in categorical terms, it is not permissible to take into account only the portion of the decree relating to Ganapathisubramania Iyer As we have stressed, the decree of Subrahmanyam, J., must be taken as a whole and by comparing one with the other there was clearly no affirmance. Further, even if it is permissible to take into account only the portion of the decree relating to the 8th respondent, there has been a substantial variation in that the liability of the 8th respondent was reduced from Rs. 32,000 to Rs 25,000. That cannot be compared to a variation in respect of costs. As for the submission that the Official Liquidators practically consented to the reduction of the liability, there is nothing in the judgment of the Bench to show that.

In S C P No 160 of 1964 and likewise in the case of Vanchesan in S C P. No. 143 of 1964, Sri S Swaminathan, learned Counsel for the Official Liquidators, contends that the decree of the Bench of this Court is one of affirmance of the decree of Subramanyam, J., so far as these persons (Ganesa Iyer, Vanchesan and Appaswami Iyer) are concerned and that no substantial question of law is involved. Sri S. Narasinga Rao appearing for V Ganesa Iyer and Sri K. Sarvabhuman appearing for Vanchesan, however, contend that the decree of the Bench of this Court was not one of affirmance and that even if it should be taken as one of affirmance, a substantial question of law is involved The argument of Sri S. Swaminathan is based on the assumption that the decree of Subrahmanyam, J., should be split up into three decrees, (1) so far as Ganesa Iyer is concerned, (2) so far as Vanchesan is concerned, and (3) so far as Appaswami Iyer is concerned, and that similarly the decree of the Bench of this Court could be construed as three different decrees so far as these persons are concerned. In our opinion, this assumption is untenable in view of the clear pronouncement of the Supreme Court in *T Rajaram* v *Radhakrishnayya*[1] It may be recalled that in the Supreme Court also the same argument was advanced that because for the purpose of valuation each appeal would have to be considered separately, that would result in the splitting

1 (1962) 1 S C J 568 (1962) 1 M L J (S C) 248 (1962) 1 An W R (S C) 248 A I R 1961 S C. 1795

up of the decree. But that argument was rejected and it was pointed out that the criterion of valuation was a separate criterion which had nothing to do with the decree being only one on the question of affirmance Sri Swaminathan referred to three decisions in support of his contention, *Vaithilinga Mudaliar* v. *Somasundaram Chettiar*[1], *Fateh Kunwar* v. *Durbijai Singh*[2] and *Radha Kunwar* v. *Reoti Singh*[3].

In *Vaithilinga Mudaliar* v *Somasundaram Chettiar*[1], the suit was brought by the next reversioners on the death of the widow of the alleged last male holder and the several persons who were in possession of portions of the estate as alienees were impleaded as defendants. The Subordinate Judge decreed the suit The alienees filed separate appeals to the High Court. Some of the appeals were allowed by the High Court But only one appellate decree was drawn up in respect of all the appeals in accordance with rule 105 of the then Civil Rules of Practice corresponding to rule 93 of the present Rules The plaintiffs applied for leave to appeal to the Privy Council in respect of those appeals of the alienees which had been allowed. The valuation of the properties involved in each of the appeals was less than Rs 10,000, the limit of appealability then. But, if all the appeals were taken together, the valuation exceeded Rs. 10,000 The Bench of this Court refused leave upholding the contention of the alienees that though in form there was one appellate decree, really it amounted to as many decrees as there had been appeals of the alienees It seems to us that this decision must be held to have been overruled by the decision of the Supreme Court in *T Rajaram* v. *Radhakrishnayya*[4], where it will be seen the facts were identical except that the suit was brought by the son and not by the reversioners. The Supreme Court definitely rejected the contention that the decree could be split up and treated as several decrees because there were several causes of action or several subject-matters or claims The decision in *Fateh Kunwar* v. *Durbijai Singh*[2], was expressly overruled by the Supreme Court *T. Rajaram* v *Radhakrishnayya*,[4] see page 1804

In *Radha Kunwar* v. *Reoti Singh*[3], the Privy Council upheld the preliminary objection that the appeal was not maintainable inasmuch as the value of the subject-matter of the appeal was less than Rs. 10,000 though the High Court had held the contrary. The question arose thus. There was a mortgage suit in which the mortgagee claimed Rs. 8,000 odd Radha Kunwar (appellant before the Privy Council) was impleaded as a defendant as claiming ownership of 4 biswas share through one Hukum Singh, not a mortgagor of the plaintiff That was a claim of paramount title and should not have been tried in the mortgage suit at all. However, it was tried The claim of Radha Kunwar was upheld in respect of 2 biswas share by the trial Court. On appeal it was held by the High Court that the 4 biswas share was liable to satisfy the mortgage in favour of the plaintiff. The appellant applied for leave to appeal to the Privy Council. The value of the 4 biswas share was only Rs. 2,000 (see the judgment of the High Court at page 490). But it was held that that was not the value of the subject-matter of the appeal to the Privy Council and that the value of the subject-matter was the sum of Rs 38,000 odd to satisfy which the 4 biswas share of the appellant was also liable Their Lordships of the Privy Council pointed out that that view was wrong and that the value of the subject-matter in appeal was only the market value of the property claimed by the appellant and since the application for leave was argued before the High Court on the footing that the market value would be less than Rs. 10,000 the appeal did not lie to the Privy Council. So far no difficulty is created by the judgment of the Privy Council. But at page 493 the judgment of the Privy Council reads as though what was involved was the market value of the two biswas share. This is sought to be read in conjunction with the judgment of the High Court in granting the leave for appeal where the High Court had said

> "The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the appellant had no claim and as to one-half there were differing judgments"

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1 I L R 42 Mad 228 (1918) 36 M L J 119

2 I L R (1952) 2 All 605 A I R 1952 All 942 (F B)

3 I L R 38 All 488

4 (1962) 1 S C J 568 (1962) 1 M L J (S C) 248 (1962) 1 An W R (S C) 248 A I R 1961 S C 1795 (1804)

Mr. Swaminathan would read the judgment of the Privy Council as though, by referring to the market value of the 2 biswas, they endorsed the observations of the High Court that the decree of the High Court should be split up into two portions, that one portion was a judgment of affirmance and another was not so. But the question in that form did not at all fall to be considered by the Privy Council in that case and, as we pointed out, even the judgment of the High Court clearly points out that even the market value of the 4 biswas would be only Rs. 2,000 The judgment of the Privy Council cannot therefore be taken as authority on the question that a decree could be split up. The direct decision on that point is the later decision of the Privy Council in *Annapurnabai's case*[1] referred to by their Lordships of the Supreme Court in *T Rajaram* v. *Radhakrishnayya*[2] In any case, the decision of the Supreme Court is clear on this point and holds the field.

In view of our conclusion that there was only one decree of this Court and that it was not one of affirmance of the decree of Subrahmanyam, J , it is unnecessary to consider the alternative submission of Sri Narasinga Rao and Sri Sarvabhuman that a substantial question of law is involved in their proposed appeals. But we may say that according to the criterion laid down by the Supreme Court in *Chunilal V. Mehta* v. *C.S. & M Co., Ltd*[3], it will have to be held that a substantial question of law is involved in their appeals, the question being whether a Secretary or an Assistant Secretary (or an Accountant) would be an officer of the Bank for the purpose of section 235 No doubt, Subramanyam, J , and the Bench of this Court had little difficulty in holding that they would be Officers of the Bank But according to the criterion laid down by the Supreme Court, still there would be a substantial question of law because there does not seem to be any direct decision of the Supreme Court or the Federal Court or the Privy Council on this point and the conclusion was reached by Subrahmanyam, J , and the Bench only after some discussion of the alternative views.

We have pointed out that in S C P. No. 143 of 1964 the proposed appeal of Appaswami Iyer can be valued only at Rs. 13,450 and therefore it does not satisfy the test of valuation under Article 133 (1) (*a*) Sri Sarvabhuman, however, invited us to consolidate the appeal of Appaswami Iyer with the appeal of Vanchesan under the provisions of Order 45, rule 4 and in that connection he relied on the decision of the Full Bench of this Court in *Lakshminarasimhacharyulu* v. *Ratnam*[4]. Order 45, rule 4 says

"For the purpose of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated "

But we do not have different suits in this case and that provision cannot directly apply to separate matters in the same misfeasance application It seems to us, however, that since the question raised in his (Appaswami Iyer's) appeal, namely, whether he is an officer of the company under section 235 of the Companies Act, is the same which Ganesa Iyer and Vanchesan are raising in their appeals, for which leave has been granted, it would be in consonance with justice to say that under these circumstances the case of Appaswami Iyer is a fit one for appeal in the Supreme Court under section 133 (1) (*c*). There is ample precedent for this course. In *Mukandi Lal* v *Hashmat-un-nissa*[5], Sulaiman, C J., and Bennet, J., certified that the case was a fit one for an appeal to the Privy Council under section 109 (*c*), Civil Procedure Code, even though the requirements of section 110, Civil Procedure Code, were not fulfilled because the ground of the proposed appeal was common to the other appeals in which leave had been granted. They referred to the circumstance that in a previous case where a similar course had been adopted, the Privy Council had taken no objection. After the Constitution of India came into force, the same principle was applied by this Court in *Subbayyamma* v. *Venkayya*[6], see in particular the

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1 L R 51 I A 319 I L R 51 Cal 969
2 (1962) 1 S C J 568 (1962) 1 M L J (S C) 248 (1962) 1 An W R (S C) 248 A I R 1961 S C 1795
3 A I R 1962 S C 1314.
4 (1949) 2 M L J 235 I L R (1950) Mad 10 A I R 1949 Mad 739
5 A I R 1936 All 832
6 (1955) 2 M L J 401 I L R (1955) Mad. 786 A I R 1954 Mad 876

judgment of Krishnaswami Nayudu, J. This was followed in *Gwalior Sugar Co., Ltd* v. *State*[1] The decision in *Erramma* v *Veerpanna*[2] approved of this principle but held that this principle was not applicable to the case before them. Accordingly leave is granted in respect of all the persons

V.K. ——— *L ave granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT —MR. P CHANDRA REDDY, *Chief Justice* AND MR. JUSTICE M. NATESAN.

G Balusamy Naidu .. *Petitioner**

v.

Election Court, Udumalpet and others .. *Respondents.*

Madras Panchayats Act (XXXV of 1958), *section* 28—*Rules* 11 *and* 12 *of the Rules for the Decision of Election Disputes relating to Panchayats—If inconsistent with section* 28 *and void*

Rules 11 and 12 of the Rules for Decision of Election Disputes relating to Panchayats framed under section 178 (2) (*ii*) of the Madras Panchayats Act (XXXV of 1958) are not inconsistent with section 28 of the Act and are not therefore liable to be struck down as null and void

It is plain from rules 11 and 12 that any one interested in the purity of elections to the Panchayat, *viz*, the electorate or the rival candidates can question the legality of the elections Unlike section 28 of the Madras Act XXXV of 1958 the remedy given by these rules is a very wide one and not restricted to persons connected with the Panchayat The parties can debate a point whether the elections were held in conformity with the statutory requirements Thus the scope of these rules is different from that of section 28 Under these rules the right of a person to offer himself as a candidate is put in issue whereas the only problem that poses itself for solution or for enquiry under section 28 is whether a person can continue to be a member Under section 28 it is the status of a candidate at the time of the filing of the petition that is to be taken into account and not at the time when he filed his nomination If the disqualification ceases to exist immediately after the election, the election cannot be challenged under section 28 notwithstanding the fact that it suffered from disqualification at the time the nomination was filed It cannot therefore be postulated, that there is essentially a conflict between section 28 and the relevant rules of the Rules for the Decision of Election Disputes relating to Panchayats They concern themselves with different aspects of the disqualification and deal with different subjects

Selvaranga Raju v *Doraiswami Mudaliar*, (1929) 57 M L J 241 I L R 52 Mad 732, followed.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Election Court, Udumalpet, in O P. Nos. 4 and 5 of 1965 dated 14th April, 1965 and quash the same

K K Venugopal, for Petitioner.

S Mohan, for 3rd Respondent.

N A. Subrahmanyam, for 4th Respondent.

The Additional Government Pleader, for 5th Respondent.

The Judgment of the Court was delivered by

Chandra Reddy, C J—The petitioner seeks the issuance of a writ of *certiorari* to quash the order of the Election Court, Udumalpet, setting aside the election of the petitioner

The petitioner and respondents 2 to 4 contested for a seat from Ward No 3 to Pudupalayam Panchayat in the General Elections held on 2nd February, 1965 At the time of scrutiny of nominations an objection was raised by the second respondent that the petitioner was disqualified by reason of his having a subsisting contract with the Panchayat within the purview of section 25 (2) of the Madras Panchayats Act, 1958 which will hereafter be referred to as the Act This objection was overruled, and, in the subsequent poll, the petitioner was declared elected.

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1 A I R 1955 M B 210 2 A I R 1957 Hyd 24.

*W P No 1636 of 1965. 30th November, 1965

Impugning this election the second respondent filed a petition under rule 11 (c) of the Rules for Decision of Election Disputes Relating to Panchayats This objection as to the petitioner's disqualification prevailed with the Election Court with the result that the petitioner's election was set aside and a fresh election ordered It is this determination of the Election Court that is impeached in this writ petition.

The basis of this petition is that the rules which empowered the Election Court to adjudicate upon disputes relating to these elections are unconstitutional in that they are repugnant to certain provisions of the Act and consequently the Election Court lacks jurisdiction to decide disputes relating to these elections What is urged by Sri Venugopal, learned Counsel for the petitioner, is that there is inconsistency between the rules, which will be extracted presently, and, section 28 of the Act, which authorises an authority to be designated by the Inspector to decide questions relating to the disqualification of members Section 28 of the Act, according to learned Counsel, contains an exhaustive code to deal with determination of all questions arising out of disqualification and any rule framed by the Government in regard to the same subject-matter and which travels beyond the scope of the section is null and void It is maintained that while section 28 of the Act confines the right to question the validity of an election to members or the executive of the panchayat or to the successful candidate himself, the rules extend such a right to all the electors and to the rival candidates This is not in consonance with the intendment of section 28 of the Act, argues learned Counsel He says that the provisions of section 28 and the relevant rules relating to election disputes disclose the repugnancy between them both

In order to appreciate these contentions we will have to read the material statutory provisions. Section 28 of the Act reads.

" Whenever it is alleged that any person who has been elected as member of a panchayat or panchayat union council is not qualified or has become disqualified under sections 22, 24, 25 or 26 and such person does not admit the allegation, or whenever any member is himself in doubt whether or not he is not qualified or has become disqualified under section 24, 25, or 26, such member or any other member may, and the executive authority or the commissioner as the case may be shall, on the direction of the panchayat or panchayat union council or of the Inspector, apply to the prescribed judicial authority whose decision shall be final "

We are unconcerned with sections 22 and 24 of the Act in this enquiry as it is the disqualification contemplated by section 25 that is relied on by the second respondent to nullify the election of the petitioner Section 25, so far as it is relevant, recites

"25 (1)

(2) A person shall be disqualified for election as a member, if, at the date of nomination or election he is—

(a) .. ..

(b)

(c) interested in a subsisting contract made with, or any work being done for, the panchayat or the panchayat union council except as a shareholder (other than a director) in a company "

No controversy is raised in this writ petition as to whether the contract subsists or not and the argument proceeded on the assumption that the petitioner has incurred the disqualification within the contemplation of section 25 of the Act.

It is apparent from section 28 of the Act that the only persons who could avail themselves of the remedy are those mentioned therein, viz, the successful candidate or other members or the executive authority or the commissioner Secondly, the disqualification can be urged only if it subsists on the date of the petition and it has no relation to a stage prior to the poll Moreover the only power given to the judicial authority is to declare that a person is or is not disqualified, and, it is not empowered to set aside the election or direct a fresh election to be held So, this is a special remedy accorded to a set of persons indicated in that section It is also pertinent to note that there is no provision in section 28 expressly providing for adjudication of disputes relating to matters preceding the poll Further section 28, by itself, cannot enforce the disqualification. Consequently a machinery for

enforcement of the disqualification has to be devised by means or rules to be promulgated under the Act This rule making power is derived by the Government from section 178 of the Act That section empowers the Government to make Rules, *inter alia*, for all matters relating to electoral rolls or elections, not expressly provided for in this Act, including deposits to be made by candidates standing for election, the conditions under which such deposits may be forfeited, and the conduct of enquiries and the decision of disputes relating to electoral rolls or elections The Rules which pertain to the present enquiry are made under the last clause of section 178 (2) (i) of the Act.

It is rule 11 of the Rules framed for decision of election disputes relating to panchayats that is relevant in the context of this petition The relevant portion of this rule reads

" 11 If in the opinion of the Election Court—

* * * * * * *

(c) the result of the election has been materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a nomination paper or vote or by any non-compliance with the provisions of the Act or the Rules made thereunder, the election of such returned candidate shall be void "

Rule 12, which has also a bearing in this enquiry, recites :

" 12 -(1) At the conclusion of the inquiry, the Election Court shall declare whether the election of the returned candidate or candidates is void under rule 11.

(2) If the Election Court declares the election of the returned candidate or candidates void, it shall further pass an order either—

(a) declaring that any other party to the petition who has under these Rules claimed the seat has been duly elected , or

(b) ordering a fresh election .. .. ."

It is plain from these rules that any one interested in the purity of elections, *viz.*, the electorate, or the rival candidate, can question the legality of the elections. Unlike section 28 of the Act the remedy given by these rules is a very wide one and not restricted to persons connected with the panchayat The parties can debate a point whether the elections were held in conformity with the statutory requirements Thus the scope of these rules is different from that of section 28 of the Act. The question whether a particular person was qualified to stand as a candidate and whether there was a proper election is the subject-matter of a petition under the rules. Under the rules extracted above the right of a person to offer himself as a candidate is put in issue whereas the only problem that poses itself for solution or for enquiry under section 28 of the Act is whether a person can continue to be a member. It is his status at the time of the filing of the petition that is to be taken into account and not at the time when he filed his nomination under section 28. It is pertinent to note that if the disqualification ceases to exist immediately after the election the election cannot be challenged under section 28 notwithstanding the fact that it suffered from disqualification at the time when he filed the nomination. It cannot therefore be postulated, that there is essentially a conflict between section 28 of the Act and the statutory rules. They concern themselves with different aspects of the disqualification and deal with different subjects

There is ample authority for this view of ours In *Selvaranga Raju* v *Doraiswami Mudaliar*[1], a person elected to the Saidapet Municipality happened to be an Honorary Magistrate in the Saidapet Bench Court at the time of his filing the nomination and was thus disqualified under section 49 (2) (iv) of the District Municipalities Act After the election the unsuccessful candidate presented a petition in the Court of the Subordinate Judge, Chingleput, impugning the election on the ground of this disqualification. The question arose whether such a disqualification could be considered in an election petition or whether the remedy provided by section 51 of the Act had to be availed of by the aggrieved person On account of difference of opinion between Devadoss, J , in *Mangala Goundar* v *Ayyathorai*

1. (1929) 57 M L J. 241 I L.R. 52 Mad. 732.

Mudaliar[1], in which it was held that no election petition lay under rule II (*c*) of the Rules relating to disputes as to the validity of elections framed under the Madras District Municipalities Act, since the expression "election" did not include nominations, and, Ramesam, J, and Curgenven, J, who took a contrary view, the reference to a Full Bench became necessary

The question to be answered by the Full Bench was formulated in these words :

"Can disqualification under section 49 or section 50 of an elected candidate be a ground for a petition impugning the election under rule I and rule II (*c*) of the rules for the decision of disputes as to the validity of an election held under the Madras District Municipalities Act, 1920, or is the remedy confined to that prescribed in section 51 and section 314 of the said Act"

It may be mentioned that rule I and rule II (*c*) of the Rules which were framed by the Provincial Government under section 303 of the District Municipalities Act are *in pari materia* with the present rules It is also worthy of note that section 51 which authorises the judicial authority to pronounce upon the disqualification of a Municipal Councillor is analogous to section 28 of the Act which is the successor of section 19 of the Madras Panchayats Act, 1950 The disqualification within the connotation of section 49 of the District Municipalities Act is similar to the one within the purview of section 25 of the Act.

The question was answered by the Full Bench in the affirmative. It was held by the Full Bench that a disqualification under section 49 could be made a ground of a petition under rule I and rule II (*c*) of the Rules for decision of disputes relating to the Muncipalities. In the opinion of the learned Judges section 51 of the District Municipalities Act, which, as already observed, corresponds to section 28 of the Act, did not operate as a bar to the maintenance of an election petition Coutts Trotter, C J, remarked that section 51 would apply only when there was an election of the candidate as a councillor which was apparently valid on the face of it and it was inapplicable in the inchoate stage of the nomination which had not resulted in at least something which purported to be an election. The view of Wallace, J., is in consonance with this rule. The learned Judge observed :

"But I do not think any real conflict will occur, if section 51 is used as it evidently was intended to be used I think it applies to cases where the election has gone through without challenge and something has occurred thereafter which raises doubt about the qualification of some sitting councillor."

In other words, if the disqualification was not noticed and no objection was raised on that score, resort should be had to section 51 But the existence of section 51 did not preclude an elector from raising in an election petition the matter of disqualification of an elected candidate Anantakrishna Ayyar, J., observed, to attract section 51 the disqualification must arise after the election and that section could not apply to a stage prior to that person having become a councillor. However, the *ratio decidendi* of his judgment was that the Legislature could not think of depriving the voters or rival candidates of their right to attack the elections merely because some remedies were made available to councillors The learned Judge thought that such an interpretation would be doing injustice to voters or rival candidates, and that, the rule should be construed as providing for the enforcement by persons themselves of rights conferred on them by statutes This decision thus makes it abundently clear that section 51 did not stand in the way of rules being made for the adjudication of disputes relating to elections, and that there was really no conflict between section 51 and rule I and rule II of the Rules.

Sri Venugopal seeks to distinguish the judgment of the Full Bench on the ground that that case dealt with the District Municipalities Act, the provisions of which were not the same as those of the Madras Panchayats Act To substantiate this distinction he cites to us the decision in *Panchayat Board of Senbakkam* v. *Gengadaran*[2]. We are not persuaded that this case lends any support to this contention The Division Bench did not make any attempt to distinguish *Selvarangam Raju* v. *Doraiswami Mudaliar*[3], on the lines suggested by Sri Venugopal. The problem that

1. (1927) 55 M.L J 632.
2. (1963) 1 M.L.J. 385.
3. (1929) 57 M.L.J. 241 I.L R. 52 Mad. 732

posed itself for solution in the cited case was whether section 19 of the Panchayats Act of 1950 could be resorted to by a President of a panchayat relying on a disqualification which subsisted at the time of the nomination A petition filed under Article 226 of the Constitution was allowed by Veeraswami, J , in the view that section 19 would come into operation only in cases of disqualification incurred after the election In an appeal against his judgment the Division Bench expressed the opinion that recourse could be had to section 19 notwithstanding the fact that the disqualification was in existence even at the time of the nomination They did not agree with Veeraswami, J , that the expression " is not qualified " had not the same connotation as " is disqualified " They felt that the two expressions did not connote two different ideas and that the words " is not qualified " and the words " is disqualified " meant the same thing The reason why the learned Judges said that section 19 could be invoked was that no objection was raised to the election, the disqualification not having been discovered at the relevant time They relied on the dictum of Wallace, J , that section 51 applied to cases where the election had gone through without challenge and something had occurred thereafter which raised doubts about the qualification of some sitting Councillor The learned Judges said

> " After making the above observations, the learned Judges of the Full Bench considered the question whether there was any conflict between the jurisdiction conferred on the District Judge under section 51 of the District Municipalities Act, and the jurisdiction conferred on the Election Court when the election is challenged by the rival candidates in an election petition They emphasised that there was really no conflict because section 51 applies to the stage after the elections has gone through without challenge whereas the jurisdiction of the Election Court relates to a challenge of the election itself by a voter or a candidate "

It is clear from this passage that the learned Judges were inclined to think that the rules were quite consistent with section 19 and that the question of conflict did not arise at all We searched in vain for an observation or for a passage in that judgment to indicate that there was any repugnancy between section 19, which is the predecessor of section 29, and the rules framed by the State Government under section 178 which are under challenge in this case On the contrary, they seemed to have proceeded on the assumption that there was harmony between the two

In Writ Petition Nos 763 and 733 of 1953 a Division Bench of the Andhra High Court took the view that if a nomination paper was improperly received or refused for the reason that the candidate was not qualified or had become disqualified within the meaning of sections 13 to 16 which correspond to sections 22 to 25 of the Madras Panchayats Act of 1958, it was a defect during the process of election and therefore that question fell to be considered only in an election petition, whereas section 19 provided for the decision of the question of the disqualification of a person who had been elected member

This view was adhered to by them in *B Srikantaiah* v *Election Officer*[1] This case bore on the interpretation of section 51 of the District Municipalities Act on a question similar to the one that presented itself in *Selvaranga Raju* v *Doraiswami Mudaliar*[2], and they held that the rules framed under the District Municipalities Act providing for decision of disputes were *intra vires* since there was no express provision in the Act as to how any disqualification under sections 48 and 49 were to be enforced No decision which has taken an opposite view has been brougt to our notice

Sri Venugopal thinks that the judgment of the Supreme Court in Civil Appeal No 538 of 1964 lends support to the theory propounded by him He draws our attention to the tests propounded by the Supreme Court in determining whether a certain provision of a State law was repugnant to the law made by Parliament.

> "Repugnancy between two statutes may thus be ascertained on the basis of the following three principles

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1. (1956) An W.R. 1161 . A.I.R. 1957 A.P. 683.
2. (1929) 57 M L J 241 . I L R 52 Mad 732.

(1) Whether there is direct conflict between the two provisions ;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature , and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field "

Applying these tests to the question whether the provisions of section 64-A of the Motor Vehicles Act, as introduced by the Motor Vehicles (Bihar Amendment) Act, 1949, was inconsistent with section 64-A of the Central Act they held that section 64-A of the Bihar Act was not repugnant to the corresponding section of the Central Act and as such it was not void They added that the section was not repealed by the Central Act and that its scope was limited only to the extent that revisions against the orders of the Regional Transport Authority, which were not appealed, had to be preferred to the State Transport Authority as such orders could be agitated only under section 64-A of the Central Act They read both the provisions so as to harmonise them and not to read a repugnancy or inconsistency between them In our opinion, this pronouncement of the Supreme Court, far from advancing the petitioner's position, furnishes an answer to the contention raised by him Be that as it may, we think that no assistance can be derived by the petitioner from this ruling.

We are firmly of opinion that neither the statutory provisions nor the decided cases lend any sustenance to the arguments advanced by learned Counsel for the petitioner. The decision of Srinivasan, J., in *Ramanathan* v. *Muthukrishnan*[1], is in consonance with the principle enunciated above.

The writ petition is dismissed with costs of the Government Additional Government Pleader's fee Rs 150.

V.K. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR JUSTICE K VEERASWAMI.

Flarence Chelliah ... *Petitioner**

v

Soundararaj Peter and others .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), Article 11 (k), Proviso and Succession Act (XXXIX of 1925), section 295—Application for probate—Objection by respondents to the grant—Application to be registered as a suit and half the Court-fee on the value of estate to be paid—Absence of a Caveat *or a* caveat *improperly stamped—Requirement as to payment of half the Court-fee on value of estate, not affected*—Caveat—*Meaning.*

The substance of section 295 of the Succession Act is that when there is an opposition to an application for probate, it becomes contentious and it is therefore to be tried as a suit But merely because a *caveat* is not entered or that it does not bear a stamp, it does not mean that the application for probate when registered as a suit need not bear one half of the scale of Court-fee prescribed under the Court-fees Act as laid down in Article 11 (*k*) of the Court-fees Act.

Caveat in probate proceedings is nothing more than a warning that the application is likely to become contentions and will have to be tried as a suit

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court, Madurai, dated 7th October, 1964 and made in O P. No 88 of 1962.

P. S. Ramachandran, for Petitioner.

K. Ramaswami, for Respondents 1 to 3.

The Court made the following

ORDER :—The petitioner filed an application for probate which bore a Court-fee stamp of Rs 5 under Article 11 (*k*) (ii) (2) of the Madras Court-fees and Suits Valuation Act, 1958. The applicant herself had impleaded a number of respon-

1. I.L R (1965) 2 Mad. 107.

* C.R.P. No 2299 of 1964. 9th December, 1965.

dents of whom the first three, her brothers, objected to the grant of probate on certain grounds In view of this contention, the Court below directed that the application should be registered as a suit and Court-fee paid under the proviso to Article 11 (*k*). This petition is to revise that order

It is argued that the proviso will have application only if a *caveat* is entered and not merely when an application is registered as a suit. The proviso is :

" Provided that if a *caveat* is entered and the application is registered as a suit, one-half the scale of fee prescribed in Article 1 of Schedule I on the market value of the estate less the fee already paid on the application shall be levied "

I shall presently consider what a *caveat* means. Section 295 of the Succession Act, 1925 lays down the procedure to be followed where there is a contention in probate proceedings In such a case the proceedings shall take as nearly as may be the form of a regular suit, according to the provisions of the Code of Civil Procedure and the petitioner shall figure as a plaintiff and the person who opposes the grant as a defendant The substance of the section is that when there is an opposition to an application for probate, it becomes contentious and it is, therefore, to be tried as a suit How a *caveat* is to be entered is provided for by section 284 of the Succession Act It should be lodged with the District Judge and should be in the form set forth in Schedule V to the Act The form in that Schedule is .

" Let nothing be done in the matter of the estate of *A B*, late of .. deceased, who died on the day of . at . , without notice to *C. D* of . "

Once a *caveat* is entered no further proceedings shall be taken in the application for probate until after notice to the *caveator* Though the Act does not define the term ' *caveat*,' from the Form in the 5th Schedule it is clear that it serves as a warning that nothing should be done in the application for probate until notice goes out to the person named or indicated The Concise Oxford Dictionary gives the meaning of the word ' *caveat* ' as process to suspend proceeding, warning. In Latin it means let him beware as in the case of *caveat emptor*, that is to say, let the buyer see to it *Caveat* in probate proceedings is nothing more than a warning that the application is likely to become contentions and will have to be tried as a suit. Entering of a *caveat* has generally to conform to the procedure prescribed in the Succession Act

But the question is whether for the purpose of the proviso to Article 11 (*k*) of the Court-fees and Suits Valuation Act, there should be a formal entry of *caveat* in order to attract the proviso, for there is contention and the application is, therefore, to be tried as a suit. Merely because there is no formal entry of *caveat*, it does not appear that the proviso is none the less applicable It is true Article 18 of Schedule II prescribes a separate Court-fee of Rs 10 on *caveat* But merely because a *caveat* does not bear stamp, it cannot be said that it is not a *caveat* any more than a plaint which bears less than the required Court-fee ceases to be a plaint on that account Where an application for probate becomes contentious and is tried as a suit, it should be assumed for the purpose of the proviso that a *caveat* is impliedly entered

On that view the petition is dismissed No costs

V.S *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR JUSTICE K. VEERASWAMI.

C D Sekkizhar .. *Petitioner**

v.

The Secretary, Bar Council, High Court Buildings, Madras, and others .. *Respondents.*

Advocates Act (XXV of 1961), *section* 7 (*b*)—*Elections Rules framed by the Madras Bar Council* (1963), *Rule* 7 (2), Explanation—*Election of members to Bar Council—Rule* 7 (2) *read with the* Explanation *prohibiting announcement or canvassing by an Advocate—Validity.*

It cannot be said that rule 7 (2) read with its *Explanation*, of the Madras Bar Council Election Rules framed under section 15 (1) of the Advocates Act (XXV of 1961) in so far as it forbids any announcement or canvassing by an Advocate of his or that of some other Advocate's candidature for election to the Bar Council is unreasonable or invalid The profession of law is a fraternity by itself and is the master of its own affairs It is entitled to prescribe rules of etiquette, conduct, standard and professional ethics for the members of the community. It is one of the most evolved and learned professions and has certainly special privileges and therefore, special responsibilities Advertisement in any form by a member of the profession of law is and has been for ages considered as reprehensible conduct. That is as it ought to be because of the dignity and high position of the noble profession Rule 7 (2) including the *Explanation* has been framed with a view to avoid any kind of advertisement by an Advocate under the guise of his or of his colleague standing for the Bar Council election and is therefore reasonable and valid

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the first respondent herein to forbear from conducting the election to the Bar Council of Madras scheduled to be held on 5th November, 1965

S Mohan, for Petitioner

A Balasubramaniam, for 1st Respondent.

G K Damodara Rao, for 3rd Respondent

G. Vasantha Pai, for 2nd Respondent.

The Court made the following

ORDER —The petitioner is an Advocate of this Court with a standing of eight years at the Bar As a member of the profession, he applies under Article 226 of the Constitution for a rule forbidding the respondent from conducting the election to the Bar Council of Madras which was originally fixed to be held on 5th November, 1965 but stayed by this Court. The petitioner contends that rule 7 (2) of the Election Rules framed by the Madras Bar Council on 20th April, 1963 and approved by the Bar Council of India on 24/ 25th August, 1963 is invalid in so far as it forbids any announcement or canvassing as provided for by the *Explanation* to the rule. The ground of invalidity, it is said, is that the *Explanation* is unreasonable. The petition is opposed not only on the ground that the *Explanation* is in keeping with the ethics and standards of the noble profession but also on the ground that the alleged invalidity of the *Explanation* is more properly agitated by means of an election petition under rule 35 of the Election Rules.

The Advocates Act, 1961 by section 3 in Chapter II provides for constitution of a Bar Council for each State and fixes its strength besides the provision for the Advocate-General of the State being an *ex officio* member thereof Section 6 (1) enumerates the functions of a State Bar Council one of which under clause (*g*) is to provide for election of the members of the Bar Council The term of office of members of the Bar Council is regulated by section 8. By this provision the term of office of the elected members of a State Bar Council shall be six years, but as nearly as possible one-third of the members first elected to the Council shall retire on the expiration of every second year in the manner prescribed. The vacancies so arising

*W P No. 4313 of 1965 6th January, 1966.

should be filled by election of new members in the prescribed manner Section 15 contains rule-making power of a Bar Council Rules may be framed by the Council to carry out the purposes of Chapter II. Among the specified items of power to make Rules in sub-section (1) of section 15 is the power to make Rules for election of members of a Bar Council and the power extends to make Rules as to the conditions subject to which persons can exercise the right to vote, the preparation and revision of electoral rolls, the manner in which election shall be held and the manner in which results of election shall be published In exercise of this power the Election Rules mentioned at the outset, have been framed These Rules cover various matters which need not be detailed here They include provision for notice of election and as to how the candidates for election may be proposed Rule 7 places a bar upon an Advocate in certain circumstances from standing for election or from holding an office or continuing in it in certain circumstances As this is the rule that is under attack, it may be set out.

"7 (1) No Advocate found guilty of professional misconduct by the present or previous Bar Council or convicted of any criminal offence involving moral turpitude and not being merely of a political nature, shall be qualified to stand for election or continue in office after such disciplinary proceeding or conviction

(2) No Advocate found guilty of any electoral misconduct in the election shall be entitled to hold office of a member of the Bar Council for a period of six years from the date of such finding

Explanation to rule 7 (2) "Electoral misconduct" shall include any announcement or canvassing in person, by post or otherwise by any Advocate, of his candidature to the Bar Council or the candidature to the Bar Council of some other Advocate other than himself Provided that a nomination to the Bar Council or announcement by the Bar Council shall not be deemed to come within this rule "

The attack on this provision is confined to the validity of the *Explanation* to sub-rule (2) Learned Counsel for the petitioner does not say, I think, quite rightly, that prohibition of canvassing in person, by post or otherwise by an Advocate is unreasonable His argument is confined to the prohibition of any announcement in person, by post or otherwise by an Advocate of his candidature to the Bar Council or the candidature to the Bar Council of some other Advocate Learned Counsel is not, however, clear how this prohibition is unreasonable and from what point of view. All that he says is that if for instance there are two persons in the profession with the same name and one of them stands as a candidate, in the absence of announcement of the identity of the particular candidate, there may be confusion in the minds of the voters It is urged, therefore, that the *Explanation* to that extent is unreasonable

The difficulty in the illustration given by Counsel rarely occurs, if at all, and is one which is not comprehended by and is not relevant to the *Explanation.* It cannot be held to be unreasonable merely by reason of what it does not provide for The whole object of rule 7 including the *Explanation* is obviously that having regard to the high ideals and place of the noble profession, no advertisement, canvassing or announcement in any manner should be permitted I consider that this is perfectly legitimate and what should be expected The position of the profession and its standards cannot be judged by the same yardstick as applies to the general public. The profession is a fraternity by itself and is the master of its own affairs It is entitled to prescribe rules of etiquette, conduct, standard and professional ethics for the members of the community. It is hardly necessary to point out that the profession of law is one of the most evolved and learned of all the professions, and has certainly special privileges and, therefore, also special responsibilities Consistent with them, therefore, it is eminently reasonable, I think, that rule 7 has been framed with a view to avoid any kind of advertisement by an Advocate under the guise of his standing for the Bar Council election or of his colleague.

Advertisement in any form by a member of the legal profession is rightly regarded as a kind of misconduct from the point of view of professional ethics. On that matter the profession cannot be judged in the same way as the trade or the rest of the public. In *A. Solicitor* In re *Law Society* ex parte [1], Hamilton, J., expressed the view

1. L.R. (1912) 1 K.B. 303 at 314.

"It is obvious that the conduct of a Solicitor in his profession must be judged by the rules of his profession and by the standard which its members set up not only for their brethren, but for themselves It is inconsistent with the proper conduct of a Solicitor in his profession that he should do that which was done in this case, namely, connect himself with a so-called debt-collecting society incorporated and registered under the Companies Act, but controlled by himself so as to make it an adjunct or instrument for the collection of business which he may take into Court in cases where it is profitable to do so. It is inconsistent with the honourable conduct of his profession that he should take business of that sort from clients without disclosing his connection with the company... ."

The Court of Appeal in *Rex* v. *General Medical Council*[1], also said :

"As in the case of the Bar so in the medical profession advertising is serious misconduct in a professional respect and that is all that is meant by the phrase 'infamous conduct' it means no more than serious misconduct judged according to the rules written or unwritten governing the profession"

That Court further observed that the Council were the judges without appeal of the existence or absence of serious misconduct in a professional respect. The principle of these decisions, which I accept as correct, is firmly established. Advertisement in any form by a member of the profession of law is and has been for ages considered as reprehensible conduct. That is as it ought to be because of the standard which the gentlemen of the profession have jealously developed and set up for themselves as befitting the honour, dignity and high position of the noble profession.

The Advocates Act leaves the question of conduct of the members of the profession to the profession itself Section 7 (*b*) of the Act gives power to the Bar Council of India on that matter and it is indeed one of its functions to lay down standards of professional conduct and etiquette for Advocates. Section 49 (*c*) also gives power to the Bar Council of India to make Rules in that regard. Rule 36 of the Rules framed the Bar Council of India in exercise of its power under the provision reads :

"An Advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or procuring his photograph to be published in connection with cases in which he has been engaged or concerned His signboard or name-plate or stationary should not indicate that he is or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organisation or with any particular cause or matter or that he specialises in any particular type of work or that he has been a Judge or Advocate-General."

The *Explanation* to sub-rule (2) of rule 7 of Election Rules is entirely in keeping with the spirit of rule 36 of the Rules relating to the professional conduct and etiquette. The Preamble to the Rules relating to professional conduct and etiquette also says :

"An Advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar or for a member of the Bar in his non-professional capacity may still be improper for an Advocate"

In the circumstances, therefore, it cannot be said that the *Explanation* to rule 7 (2) is unreasonable

It is true in politics and in elections to Local and Parliamentary bodies as in trade as well as certain other spheres advertisement and canvassing are a normal feature But what obtains in such cases is certainly toboo in elections to Bar Councils. What is proper in those cases is clearly improper in the case of the Bar Council. There is certainly no analogy between the two No doubt in any election, be it in the profession or outside, there must be a clear announcement of the candidate. Rule 12 of Election Rules provides for it It says that not less than fifteen days, before the date fixed for the election, the Secretary of the Bar Council shall cause the names of all the candidates duly proposed to be posted on a Notice Board in the Bar Council The rule also requires the Secretary to send copies of the names to the Bar Association, to the Advocate-General and to each candidate found to have been duly proposed That must be a sufficient announcement to the electorate which consists of only members of the Bar, who, as of a fraternity, know or are expected to know each other

As I said, rule 7 including the *Explanation* is reasonable and valid On this view, it is unnecessary to consider the objection based on rule 35

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1 L R (1930) 1 K B 562 at 569

The petition is dismissed. No costs. The Bar Council is entitled to proceed with the election from the place where it was stopped by the stay orders of this Court. 25th March, 1966, is fixed as the date for polling

V K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE T VENKATADRI.

R. S. Jhavar . *Petitioner**

v.

P. Thanicakchala Gramani and others . *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), section 42 (a)—Scope and intention—Suit for specific performance of unperformed portion of a contract for sale—Proper quantum of Court-fee.

The intention of section 42 (*a*) of the Madras Court-fees and Suits Valuation Act (XIV of 1955) seems to be that, where a party who has entered into a contract to purchase certain properties is able to get conveyance of a portion of the properties only, he can file a suit for specific performance of the unperformed portion of the contract and can pay Court-fee on it He is liable to pay Court-fee only on the value of the unperformed portion of the contract of which he seeks specific performance and is not liable to pay Court-fee on the entire value of the properties covered by the original contract.

Dullabho Sahu v *Adhinarayana*, A I.R 1937 Mad 831, distinguished.

Under the Specific Relief Act the Court can always direct specific performance in respect of a portion of a contract which can be severed from the original contract.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Chingleput dated 16th February, 1965 and made in Court-fee check slip No. 34 XVI N, Diary No 19 and Issue No 6 in O.S. No. 112 of 1961

A. R. Ramanathan, for Petitioner.

S Ramalingam, K C Jacob, S K L Ratan and *M X Cardoza*, for Respondents 3 to 6

M Chenniappan, for the Government Pleader

The Court made the following

ORDER.—This Revision Petition raises a question of Court-fee in the following circumstances The plaintiff filed a suit to enforce specific performance of the unperformed portion of the agreement of sale in respect of properties of an extent of 28 46 acres belonging to the 1st and 2nd defendants, father and son respectively. It is alleged in the plaint that even in 1956, 12 acres 57 cents out of 28 acres 46 cents have been transferred to the possession of the 2nd defendant, under some arrangement between him and his father, the 1st defendant, and subsequently the 2nd defendant executed a sale deed in respect of 12 acres 57 cents in favour of the plaintiff. The plaintiff in the plaint alleges that a specific performance of the contract was done by both the father and the son in respect of the 12 acres 57 cents The present suit was filed for specific performance of the unperformed portion of the contract dated 31st December, 1960, in respect of 15 acres 89 cents. The plaintiff has valued the suit for Court-fee at Rs. 3,000 per acre for 15 acres 89 cents, *i e*, Rs. 47,670 and paid Court-fee thereon. The Court-fee Examiner was of the opinion that, even though the plaintiff was able to get conveyance of 12 acres 57 cents from the 2nd defendants, still the plaintiff should seek specific performance of the contract as a whole and value the suit on that basis. The lower Court seems to have agreed with the Court-fee Examiner and directed the plaintiff to pay the additional Court-fee. It is in these circumstances the present Civil Revision Petition is filed by the plaintiff contending that he is not liable to pay the additional Court-fee on the value of the property got by him from the 2nd defendant. The plaintiff is not seeking any relief against the 2nd defendant. The prayer in the plaint is to direct defendants 1 to 3 to excute a sale deed in respect of 15 acres 89 cents. As regards 12 acres 57 cents, the father had already excuted a release deed in favour of the 2nd defendant who in his turn

*C R P, No 532 of 1965. 10th January, 1966.

conveyed to the plaintiff in pursuance of the original agreement entered into by him and his father in respect of the entire area of 28 acres 46 cents. There is some force in the contention urged by the learned Counsel for the petitioner herein. Under the Specific Relief Act a contract can be severable, and the Court may direct specific performance in respect of a portion of the contract. Though the plaintiff entered into an agreement to purchase 28 acres 46 cents from defendants 1 and 2, which is made up of 12 acres 57 cents belonging to the 2nd defendant in his individual capacity, according to the allegations made in the plaint, and the balance of 15 acres 89 cents belonging to the joint family consisting of the father, the 1st defendant and the son, the 2nd defendant, the plaintiff can always file a suit to enforce specific performance of a contract in respect of 15 acres 89 cents against defendants 1 and 2. There is no necessity for him to claim specific performance in respect of 12 acres 57 cents, which had already been conveyed to him by the 2nd defendant. According to section 42 of the Madras Court-fees and Suits Valuation Act, 1955, in a suit for specific performance, whether with or without possession, fee shall be payable in the case of a contract of sale, computed on the amount of the consideration whereas under clause (*x*) of section 7 of the Court-fees Act (VII of 1870) in a suit for specific performance of a contract of sale the Court-fee payable shall be according to the amount of the consideration The importance in section 42 (*a*) of Madras Act XIV of 1955 is the addition of the word ' computed '. Compute means calculate. The intention of section 42 (*a*) of the Madras Act XIV of 1955 seems to be that, if the plaintiff is able to get a portion of the properties, which he entered into a contract for specific performance, he can file a suit for specific performance of the unperformed portion of the contract, and he can pay Court-fee on it. The lower Court seems to have relied on a decision in *Dullabho Sahu* v. *Adhinarayana*[1], where admittedly a suit arose under section 7 (*v*) and (*x*) of the Court-fees Act, 1870. Venkataramana Rao, J., in that case has held that in a suit for specific performance the view has always been taken by this Court that there is no question of primary and secondary relief and both the execution of the conveyance and delivery of possession are essential reliefs. Venkataramana Rao, J., also observed that as the Court would in any event have to declare the original arrangement entered into and only on that basis should give the relief to the plaintiff, the suit would have to be valued on the consideration mentioned therein. Certainly this case has to be distinguished, as the word ' computed ' is not in section 7 (*x*) of the Court-fees Act, 1870. The same view has been held in *S. P Gupta* v *Abdul Rahman*[2] There also the plaintiff wanted to enforce specific performance for the balance of the amount mentioned in the original agreement. The Court following the decision in *Dullabho Sahu* v. *Adinarayana*[1], of Venkataramana Rao, J , held that the Court-fee payable on the suit was the amount of the consideration of the sale. I have distinguished the case in *Dullabho Sahu* v *Adinarayana*[1], observing that the word ' computed ' is not in section 7 (*x*) of the Court-fees Act, 1870 and also with reference to the Specific Relief Act where it says that the Court can always give relief in respect of a portion of a contract which can be severed from the original contract. I am of opinion that the petitioner is liable to pay Court-fee only on the value of 15 acres 89 cents and he need not pay Court-fee on the value of 12 acres 57 cents, which he had already obtained possession from the 2nd defendant by a registered conveyance, according to the allegation in the plaint. The Civil Revision Petition is allowed. No order as to costs

V.K. *Petition allowed.*

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1 A.I.R 1937 Mad 831

2 A.I R 1953 All 851.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

Rajathi . *Appellant**

v.

K. Selliah *Respondent.*

Hindu Marriage Act (XXV of 1955), section 9—Claim under for restitution of conjugal rights —Marriage according to self-respector's cult—Validity

Hindu Law recognises only three forms of marriages, *viz*, Shastraic, customary or statutory. If a marriage is not in conformity with any of these legal forms, it cannot be valid in law even if it is done according to certain forms and principles of a reformers' movement An association of persons cannot legislate to lay down a procedure which could result in a valid union between two spouses Custom or usage in such cases will be out of question if the movement itself was of recent origin. Moreover there cannot be a custom or usage applicable to any association of persons of different sub-sets of a caste. It has been decided that a marriage solemnized according to a movement known as self-respectors' movement is not a valid marriage It would, of course, be different if the parties could establish that the form of procedure gone through is also sanctioned by custom or usage of the particular commnunity to which the parties belonged

Deivanai Achi v *Chidambaram Chettiar*, (1955) 1 M L J 120, followed.

(Need for caution in solemnising marriages according to a reformist's zeal without legal sanction pointed out)

Appeal against the order of the District Court of Tiruchirapalli dated 22nd day of October, 1962 and made in C M.A No 31 of 1962 preferred against the order of the Court of the Subordinate Judge of Tiruchirappalli in O.P No. 43 of 1960.

S. Mohan Kumaramangalam for *R Nadanasabapathy* and *C Chinnaswamy*, for Appellant.

T. P. Gopalakrishna Aiyar, for Respondent

The Court made the following

ORDER :—This appeal arises out of an order passed dismissing the petition filed by the appellant for restitution of conjugal rights, under section 9 of the Hindu Marriage Act against the respondent.

The respondent resisted the petition filed by the appellant for restitution of conjugal rights on the ground that there was no legal or valid marriage between them. Therefore the only question that arose in the Courts below was whether there was a valid marriage between the spouses in question. Evidence was adduced to describe the nature of the ceremonies by the persons who attended the marriage and conducted the ceremony. E. V. Ramasami Naicker, who is popularly known as "Periyar", deposed that before the actual marriage was celebrated, it was advertised in his paper, 'Viduthalai' that the marriage would be taking place on 2nd November, 1958 at Tiruchirappalli. The actual ceremony was conducted by him and in his presence. The parties were seated on a platform before a *Kuthuvilakku* or lighted lamp They made a declaration that they were taking each other as husband and wife. This declaration is known as "வாழ்க்கை துணை ஒப்பந்தம்". Then they exchanged garlands and went round the platform where the *Kuthuvilakku* was placed. They were declared as husband and wife by E.V. Ramaswami Naicker.

Now the important question that arose for consideration in the Courts below was whether such a marriage was valid in law. Both the Courts have held that such a marriage is not a valid marriage and that therefore the appellant is not entitled to the relief of restitution of conjugal rights The unfortunate wife has now preferred this appeal.

Before me, learned Counsel for the appellant has contended that the Courts below ignored the most important fact namely that according to the custom of the community to which the appellant belonged, the parties to the marriage used to exchange garlands and make a declaration in the prescribed form on the occasion.

*A A A O No. 60 of 1963 29th January, 1966

This Court, as early as 1955, in *Deivana Achi* v. *Chidambaram Chettiar*[1], also a case arising on similar facts, has held that the Hindu Law recognised three forms of marriage namely sastraic marriage customary marriages and statutory marriages. It will be useful to refer to a particular passage in that Judgment at page 124 :

> " Whether an association of persons of different sub-sects can legislate themselves to lay down a procedure which results in a valid union between two spouses is a question, which requires deeper consideration . Custom or usage in the present case is out of the question as the association was started recently, and the practice, even if it is obligatory, was not sanctioned by long usage apart from the question whether a conglomeration of persons drawn from different sub-sects or a caste could start a usage of their own so as to modify or alter the law laid down by Hindu Sastras There may be a custom or usage of a particular caste or sub-sect or even of a family modifying Hindu law but as usage applicable to an association of persons of different sub-sects of a caste, so far as we are made aware, was never judicially recognised "

The learned Judge held in the decision cited that the marriage according to the self-respectors' cult or Suyamariyathai cult was not a valid marriage. The law has thus been clearly laid down as early as 1955. Even before that decision, many such marriages had taken place. Even after the decision was rendered in that case, persons having revolutionary ideas have resorted to this form of marriage under the guidance and presence of distinguished reformers or leaders of society. Generally, a reformer or promotor of any movement or crusade works incessantly to create public opinion and also makes research on materials available to him to prove that the reform that he wants to put into the society is a legal one. The reformers should mobilise public opinion so as to bring the necessary legislation which would declare that such marriages are valid in law. Under the existing legal prescription, the Courts have declared that such marriages, as was solemnised in the present case, are illegal, irregular and void. The agitation in respect of Suyamariyathi marriage has not yet achieved the general adoption of the form of marriage as contemplated by such reformers. The movement has not yet succeeded in revising the attitude of the Hindu public to break down the age-long traditions and sentiments. The movement has, no doubt, to a certain extent, made an impact on a particular class of society which consist of persons emotional and revolutionary in ideas of the customs of marriage. No useful purpose would be served by reformers by merely presiding over such marriages and conducting the ceremony according to their own ideas, knowing fully well that such marriages are not valid in law. No useful purpose would be served by mere exchange of garlands and making declarations that they would live as husband and wife on equal terms. In the instant case, I happened to persue the declaration known as "வாழ்க்கைத்துணை ஒப்பந்தம்". It is written on a scrap of paper not worthy of the occasion In this connection, I am reminded of the words of Bernard Shaw who rightly attacked the folly of the spouses making promises just before their marriage :

> " When the people are under the influence of most violent, most insane, most delusive and most transient of passions, they are required to swear that they will remain in that excited, abnormal and exhausted condition until death do them part "

Number of instances have come to Court when persons, who resort to such marriages take the earliest opportunity, whenever there is some reproach between the spouses or whenever the infatuation is lost, of deserting the other party, taking advantage of the legal prescription already rendered in this Court that such marriages are void in law. Persons who encourage such marriages are not doing anygood to the society or to themselves. Many of the homes which would otherwise have been sweet are wrecked because of the legal defect in this form of marriage. The reformers, who advocate such marriages by exchange of garlands and declarations, should also at the same time see that such marriages are registered under the Special Marriage Act, so as to give a legal effect to them.

The appellant in the instant case is a Kannada Balija Naidu and the respondent is a Kallar. The appellant was at the college, when the respondent appears to

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1 (1955) 1 M L J 120

have fallen in love. Due to the advice of mediators, the marriage was celebrated according to the Suyamariyathai cult. According to the evidence of the respondent, he went to attend a function in which Periyar was expected to be present. He was there asked whether he would be willing to marry the appellant and he was compelled to go through the function. This can hardly be true, because even two days before the marriage, it was advertised in Viduthalai that such and such a marriage would be taking place on 2nd November, 1958. The respondent must have been under an infactuation to marry the appellant. He seems to have been under a spell which, though it may be timeless, has a very meagre time-limit, for, in this case, within a short time after the marriage the respondent fled away to his native place leaving the appellant in her village. However, I see in the evidence that the parties have observed some sort of custom in this marriage. Now if the appellant could establish that such a custom of exchanging garlands and making declaration and going round *Kuthuvilakku* prevailed in her community at the time of marriage, then she could plead that custom of usage to prove that her marriage is valid in law The Courts below do not appear to have bestowed attention on this aspect of the matter whether there is a custom prevailing in the community of the appellant or the respondent of sitting before a *Kuthuvilakku*, making a declaration or promise, exchanging garlands and going round the *Kuthuvilakku* which would make the marriage valid in law If such a custom or usage is proved, then certainly the Court can declare the marriage in question as valid. For this reason, I remit the petition to the Sub-Court, Tiruchirapalli. The learned Subordinate Judge will frame the necessary points for determination and try the petition giving the parties liberty to adduce evidence and finally decide the case according to law and in the light of the observations contained in this judgment.

The appeal is ordered accordingly. There will be no order as to costs.

R M ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE R. SADASIVAM

Muthiah and others *Petitioners**

Prevention of Food Adulteration Act (XXXVII of 1954), *sections* 2 (xiii), 7 (v) *and* 16—*Prevention of Food Adulteration Rules* (1955), *Rule* 44-*A*—*Conviction under section* 16 (1) *read with section* 7 (v) *and rule* 44-*A* —Mens rea *or guilty knowledge if necessary* —*State Government introducing rule* 44-*A by a notification with effect from the date of its publication in the gazette*— *Validity of notification*—*Sale of kesari dal as cattle feed*—*If punishable*

Constitution of India (1950), *Articles* 19 (1) (*g*) *and* 19 (6)—*Rule* 44-*A of the Prevention of Food Adulteration Rules, if void as offending Article* 19 (1) (*g*)

The maxim *actus non facit reum nisi mens sit rea*, so often invoked in English Common Law, is not of great importance where as in India, the law is codified and the offences are carefully defined so as to include the *mens rea* in the definition itself. The definitions in the Penal Code along with the general exceptions are perhaps sufficient to exclude all cases to which *mens rea* cannot be attributed and where neither the definition nor the general exceptions exclude a case of this kind, the general doctrine would be of no help

It is a sound basic rule of interpretation which ordains that each individual offence must be looked at by itself and that it is either unjustifiable or irrelevant to consider the construction adopted in other cases involving analogous offences It is therefore not possible to construe section 16 of the Food Adulteration Act, which is absolute in character , as requiring *mens rea* on the strength of the decision of the Supreme Court in *Nathulal* v *State of M P*, A I R 1966 S C 43 Hence the contention that in the case of a sale of a prohibited article of food (like kesari dal), unlike in the cases of adulterated or misbranded food, there cannot be a conviction under section 16 (1) read with section 7 (v) of the Prevention of Food Adulteration Act in the absence of *mens rea* or guilty knowledge, is untenable.

Rule 44-A of the Prevention of Food Adulteration Rules (1955) does not require that the date fixed by the State Government for that rule to come into force in a State should be some date later than the date of the publication in the Gazette of the notification introducing that rule. Hence the

* Crl R C Nos 1363, 1724 and 1800 of 1964
Crl. R P Nos 1337, 1695 and 1771 of 1964 27th September, 1965.

fact that the Madras Government has introduced rule 44-A in the Madras State by a notification with effect from the date of its publication in the Gazette would not render the notification void, though it would be desirable, in the absence of any emergency, to give sufficient notice to the public or the dealers that rule 44-A would be introduced into the State, by fixing a date after the lapse of a reasonable time from the date of the publication in the Gazette

Kesari dal is an article of food and since it is absolutely prohibited from being sold by rule 44-A of the Prevention of Food Adulteration Rules, it cannot be contended that sale of kesari dal would be no offence if it is sold under a bill stating that they were sold for being used as cattle fodder and not for human consumption

The contention that the complete prohibition of trade in kesari dal even as cattle fodder by rule 44-A is void as offending Article 19 (1) (*g*) of the Constitution of India is untenable The reason for framing rule 44-A is that kesari dal is found to be a poisonous foodgrain, the consumption of which would seriously affect the health of the consumers Hence the prohibition would clearly come within the saving clause (6) of Article 19 of the Constitution of India.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of Session, Kanyakumari Division at Nagercoil, dated 14th July, 1964, and made C A. Nos. 35, 28 and 34 of 1964 respectively against (C C. Nos. 152, 160, 151 of 1963 respectively on the file of the District Magistrate (J), Kanyakumari at Nagercoil).

K. K Venugopal, G Sethu Thambi, S. Chellaswamy and *T. S Srinivasan*, for Petitioners.

K A Panchapakesan, for the Public Prosecutor, for State

The Court made the following

ORDER.—The petitioners in these cases have been convicted under section 16 (1) read with section 7 (*v*) of the Prevention of Food Adulteration Act (hereinafter referred to as the Act) read along with rule 44-A of the Rules framed under the Act and sentenced to pay a fine of Rs 100 each, in default to R. I. for two months. Rule 44-A provides that no person in any State shall, with effect from such date as the State Government concerned may by notification in the Official Gazette specify in this behalf, sell or offer or expose for sale, or have in his possession for the purpose of sale, under any description or for use as an ingredient in the preparation of any article of food intended for sale, kesari gram, kesari dal, *etc.*

The reason for the rule is that kesari dal has been found to be a poisonous food grain as would appear from the following passage at page 698 of Medical Jurisprudence and Toxicology by Modi, Twelfth Edition ·

" *Lathyrus Sativus* (Kesari Dal, Teora or Buttorah ki dal) —

This is a variety of pulse, belonging to M O Leguminosae, and is used as an article of diet by the common people in Sind, Bihar, Uttar Pradesh, and some parts of Madhya Bharat and Madhya Pradesh Its continued use gives rise to a disease characterised by spastic paraplegia, known as lathyrism or vetch-poisoning "

Though the above rule was framed as early as 1955, the Madras Government issued G O Ms No 1755, Health, dated 9th July, 1963, specifying the date of the publication of the notification in the *Fort St George Gazette* as the date from which no person shall sell or offer or expose for sale, or have in his possession for the purpose of sale, under any description or for use as an ingredient in the preparation of any article of food intended for sale, kesari gram, kesari dal etc Though almost all the States in India have brought rule 44-A into force by notifications, the rule has still not been extended in Madhya Pradesh as would appear from the penultimate paragraph of the judgment of the lower appellate Court which set aside the confiscation of the goods kept by the petitioners and permitted the same to be transported to Madhya Pradesh

P W 1, Janardhanan Pillai, Food Inspector, Nagercoil Municipality, got the Gazette notification mentioned above on 17th August, 1963, and went and purchased kesari dal from the shops of the petitioners on the morning of 19th August, 1963 and prosecuted them after getting the grains analysed by the Public Analyst The facts of the case as found by the Courts below were not disputed except as regards the purpose for which the article was sold The petitioners issued

cash bills to the Food Inspector stating that the articles were sold as cattle feed. The contention of P W. 1 was that the cash bills had been tampered with subsequently by the addition of the words 'that they were for cattle feed.' It is no doubt difficult to accept this contention But the lower appellate Court has found that it is not possible to accept the case of the petitioners that the articles were sold by the petitioners for being used as cattle fodder I shall however proceed to deal with the case on the footing that the petitioners sold kesari dal as an article of food for cattle

The main contention urged by the learned Advocate for the petitioners, on the strength of the decision of the Supreme Court in *Nathulal* v *State of Madhya Pradesh*[1], is that in the case of a sale of a prohibited article of food, as in this case unlike in the cases of an adulterated or misbranded food, there cannot be a conviction in the absence of *mens rea* or guilty knowledge

The maxim *actus non facit reum nisi mens sit rea,* so often invoked in English Common Law, is not of great importance where, as in India, the law is codified and the offences are carefully defined so as to include the *mens rea* in the definition itself The definitions in the India Penal Code along with the general exceptions are perhaps sufficient to exclude all cases to which *mens rea* cannot be attributed and where neither the definition nor the general exceptions exclude a case of this kind, the general doctrine would be of no help. But in In re *Venkayya*[2], a Bench of this Court held that in order to constitute the offence of personation under section 171-D of the Indian Penal Code, it is necessary to prove that the accused in doing the act with which he is charged was actuated by a corrupt motive, though the section did not refer to any such *mens rea,* and in so holding the Court relied mainly on the fact that section 24 of the Ballot Act (35 and 36, Vic, Chapter XXXIII) which corresponded to section 171-D of the Indian Penal Code in all respects, was held in *Stepney case*[3] as requiring a corrupt motive

The following passage occurs at page 11 of Halsbury's Laws of England, Second Edition, Volume 9 .

"*Mens rea,* or a blameworthy condition of the mind, may consist of a traitorous or malicious or fraudulent intent or of guilty knowledge or negligence , knowledge that an act is morally wrong, although the special circumstances which render it criminal are not known to the doer, is in some cases sufficient, and *mens rea* may consist simply of an intent to do an act which is forbidden by law In a limited class of offences, *mens rea* is not an essential element. This class consists, for the most part, of statutory offences of a minor and only quasi-criminal character and, in order to determine whether *mens rea* is an essential element of an offence, it is necessary to look at the object and terms of the statute which creates it."

In an instructive article by former Professor Sayre, Public Welfare Offences[4], the cases which have construed statutes as creating such offences are classified in the following manner .

"1. Illegal sales of intoxicating liquor, including sales of liquor not known to be intoxicating, sales to minors believed to be of full age, and sales to habitual drunkards and Indians not known to be such

2 Sales of impure or adulterated food believed to be pure and not adulterated

3. Sales of misbranded articles in violation of the Federal Food and Drugs Act and Insecticide Act

4. Violations of State and Federal Narcotic Acts

5. Criminal nuisances, including business not known to be injurious to the public health, repose or comfort, and unknown obstructions of highways

6. Violations of minor traffic regulations

7. Violations of motor vehicle laws, including dangerous driving, operating an automobile without a proper registration, failure to carry proper lights, and possession of automobiles from which the manufacturer's original serial numbers have been removed

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1 A I R 1966 S C 43 34
2 (1929) 58 M L J 111 I L R 53 Mad 444
3. Reported in 4 O' Malley and Hardcastle, 4 (1933) 33 Col L Rev 55

8 Violations of general Police Regulations, including health regulations, factory and labour laws building laws, game laws, railway regulations and other similar minor Police Regulations

In the valuable monogram, "*Mens rea* in Statutory Offences" by Dr Edwards, Chapter XI, there is a comprehensive and critical examination of the various judicial interpretations of statutory offences and the various theories of liability It is pointed out by the learned author that sometimes, it has been seen the Court adopts the full-blooded theory of absolute prohibition, under which liability is said to be incurred by the mere intentional doing of the forbidden act and no reference is made to the doctrine of *mens rea* The reasons sometimes put forward for abrogating the doctrine of *mens rea* when interpreting a statutory offence is the difficulty of procuring adequate proof of guilty knowledge The learned author also points out that according to many Judges it is of paramount importance to take into account the social purpose behind the statutes which, it is said, should be interpreted in the way which is most likely to give effect to the intention of Parliament and that this line of reasoning, perhaps by coincidence, is almost invariably resorted to when it is proposed to exclude the doctrine of *mens rea* Thus in *Parker* v *Alder*[1], an innocent milk vendor was convicted under the Food and Drugs Act for selling milk adulterated in the course of transit by an unknown person Lord Russell of Killowen, C J, posed the question.

"Now, assuming that the respondent was entirely innocent morally and had no means of protecting himself from the adulteration of this milk in the course of transit, has he committed an offence against the Act?

It is pointed out at page 83 of "*Mens rea* in Statutory Offences" by Edwards that having given an affirmative answer to this question the learned Chief Justice justified his conclusion by saying.

"When the scope and object of these Acts (the Food and Drugs Acts) are considered it will appear that if he were to be relieved from responsibility a wide door would be opened for evading the beneficial provisions of this legislation

In the same case, Wills, J expressed the opinion that

"the legislation on the subject was intended to be drastic, and the offence was created quite independently of the moral character of the act"

The fact that section 16 of the Food Adulteration Act is absolute in its character has been recognised by several decisions of this Court and the Supreme Court. Thus in *Sarjoo Prasad* v *State of U P.*[2], it was held that the Legislature has, in the interest of public health, enacted the Act and has provided that all persons are prohibited from selling adulterated food and in the absence of any provision, express or necessarily implied from the context, the Courts will not be justified in holding that the prohibition was only to apply to the owner of the shop and not to the agent of the owner who sells adulterated food It was observed in that decision that if the owner of a shop in which adulterated food is sold is without proof of *mens rea* liable to be punished for sale of adulterated food, there is no reason why an agent or a servant of the owner is not liable to be punished for contravention of the same provision unless he is shown to have guilty knowledge The decision of the Supreme Court in *Nathulal* v *State of Madhya Pradesh*[3], referred to earlier, related to the Madhya Pradesh Foodgrains Dealers Licensing Order dealing with wholesome foodgrains and having regard to the object of the said Act, namely, to control in general public interest, among others, trade in certain commodities, it was held that it could not be said that the object of the Act would be defeated if *mens rea* is read as an ingredient of the offence It is a sound basic rule of interpretation which ordains that each individual offence must be looked at by itself and that it is either unjustifiable or irrelevant to consider the construction adopted in other cases involving analogous offences It is therefore not possible to construe section 16 of the Food Adulteration Act as requiring *mens rea* on the strength of the decision in *Nathulal* v. *State of Madhya Pradesh*[3], on the file of the Supreme Court of India

1. L R (1899) 1 Q B 20
2 (1961) 1 S.C J. 484: (1961) M L J (Crl) 284: (1961) 1 M.L J (S.C) 133: (1961) 1 An W.R (S C) 133.
3 A I R. 1966 S.C. 43.

The learned Advocate for the petitioners relied on the decision in *Sherras* v. *De Rutzen*[1], where it was held that section 16, sub-section (2) of the Licensing Act, 1872, which prohibits a licensed victualler from supplying liquor to a Police Constable while on duty, does not apply where the licensed victualler *bona fide* believes that the Police Constable is off duty But it is clear from the judgment of Wright, J., that there is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered. The judgment refers to the several classes of cases to which the said doctrine would not apply and one of the classes mentioned in the judgment relates to cases under Adulteration Acts It is sometimes difficult to reconcile several decisions which adopt divergent attitude as to the requirement of *mens rea* in statutory offences, defined almost on identical terms. The following passage occurs in Kenny's Outlines of Criminal Law, Seventeenth Edition, at page 50.

"Another instance of contrast is between *Sherras* v. *De Rutzen*[1] and *Chundy* v *Lecocq.*[2] In the former it was held, in effect, that a publican who served drink to a Policeman who was on duty should be excused if he could prove that he believed the officer not to be on duty from the fact hat he was not wearing his armlet, whereas in the latter case it was held that, on a charge of supplying drink to a man who was drunk, it was no defence to prove a belief that the customer was sober. Perhaps an adequate justification for the difference in the interpretation of the statutory provisions in these two cases may be suggeste d In the former the publican had no reasonable means of discovering whether the Policeman was on duty except by looking to see if he was wearing the armlet. The Police authorities alone had certain means of information on this point, namely, the record of the appropriate officer at the Police Station But in the latter case the customer's drunkenness could be ascertained just as well by the publican (or his representative) as it could be by any Police witness who observed the man's condition at the material time in the public house"

I have already referred to the passage in Dr. Edwards "*Mens rea* in Statutory Offences" that the reasons sometimes put forward for abrogating the doctrine of *mens rea* when interpreting a statutory offence is the difficulty of procuring adequate proof of guilty knowledge. The learned author observes at page 245 of his book that there is considerable force in this argument, which is recognised by the Legislature itself and that it is becoming quite common to find a proviso inserted in an offence of seemingly absolute liability to the effect that it is a defence if the accused can prove that the offence was committed without his knowledge or connivance. Such is the provision contained in section 19 of the Prevention of Food Adulteration Act which states the defences which may or may not be allowed in prosecutions under the Act

The learned Advocates for the petitioners contended that section 19 deals only with adulterated or misbranded articles of food described as items 1 and 2 of section 7 of the Act and they do not refer to items 3, 4 and 5 of section 7, which are also governed by the punishing section 16 of the Act The reason for the distinction is obvious as a dealer in adulterated or misbranded food who can plead and prove the defences open to him under section 19 of the Act would be an innocent person who was not aware of the fact that the article of food was adulterated or misbranded. But there could obviously be no such defence in the case of a person who sells articles of food described as items 3 to 5 in section 7 of the Act as the vendor would know the nature of the said articles Hence the possession, sale and distribution of such articles are aboslutely prohibited under section 16 of the Act and no defences are allowed in such cases of adulterated or misbranded articles of food

The learned Advocate for the petitioners relied on the fact that under rule 44-A of the Rules framed under the Act, the rule could come into force in any State only from such date as the State Government concerned may by notification in the Official Gazette specify in this behalf and contended that as a rule normally comes into force on the date of its publication even in the absence of any such provision, it is proper to hold that the State Government should fix some future date for the coming into force of rule 44-A of the Rules framed under the Act so that the dealers may have

1. L R. (1895) 1 Q B. 918.
2. L R (1884) 13 Q.B D. 207.

due notice that an act which was lawful till the date fixed in the notification would become unlawful But there is no such requirement in rule 44-A of the Rules framed under the Act that the date fixed by the State Government should be some date later than the date of the publication of the notice in the Gazette It is true that it is desirable that in the absence of any emergency to give sufficient notice to the public or the dealers that rule 44-A of the Rules framed under the Act would be introduced into the State by fixing a date after the lapse of a reasonable time, namely, three months or six months from the date of the publication in the Gazette In *Rex* v *Bailey*[1], the prisoner was tried before Lord Elden, at the Admiralty Sessions, December, 1799, on an indictment for wilfully and maliciously shooting at Henry Truscott and it was insisted that the prisoner could not be found guilty of the offence with which he was charged because the Act of the 39 Geo III c 37, upon which the prisoner was indicted received the Royal assent on the 10th May, 1799, and the fact charged in the indicment happened on the 27th of June, in the same year when the prisoner could not know that any such Act existed (his ship, the '*Langley*,' being at that time upon the coast of Africa) Lord Eldon told the jury that he was of opinion that the accused was, in strict law, guilty within the statutes, taken together, if the facts laid down were proved, though he could not then know that the Act of the 39 Geo III c 37 had passed, and that his ignorance of that fact could in no wise affect the case than that it might be the means of recommending him to a merciful consideration elsewhere should he be found guilty The decision in *Harla* v *The State of Rajasthan*[2], relied on by the learned Advocate for the petitioners can have no application to the facts of the present case as it only held that a mere resolution of a Council of Ministers in the Jaipur State without further publication or promulgation will not be sufficient to make a law operative. In the present case there was publication in the Gazette and there is therefore no scope to rely on the principle of the above decision In the Full Bench decision in *Govinda Pillai* v *Padmanabha Pillai*[3], the validity of the notification of the Kerala Government published in the Gazette of 7th July, 1961, fixing the date of the coming into force of rule 44-A of the Rules framed under the Act, as 1st July, 1961, was considered on the objection of the accused that it offended Article 20 (1) of the Constitution as creating an offence with retrospective effect It was held in that decision that with regard to acts of possession of kesari dal between 1st and 7th July it can be said that, in view of Article 20 (1) of the Constitution, the prohibition was of no avail to create an offence But it was held that the acts of possession in the cases considered in the decision were all after the 7th July and hence there was no reason why the notification as a whole must go merely because the prohibition it imposes cannot make offences of acts committed between the 1st and 7th July But in the present case, the Madras Government has fixed the date of the coming into force of rule 44-A of the Rules framed under the Act in this State only from the date of the Gazette notification and it cannot be held to be invalid

The learned Advocates for the petitioners relied on the decision in *Nagar Mahapalika, Varnasi* v *Panna Lal*[4], where it has been pointed out that kesari dal is not ordinarily used for human consumption and hence it is not included within the definition of 'food' in section 2 (v) of the Act, that it is used as cattle fodder and that where a shop-keeper sells kesari dal to a Food Inspector for purpose of analysis and not for human consumption, no offence is committed under section 16 of the Act But a contrary view has been taken in the Full Bench decision in *Govinda Pillai* v *Padmanabha Pillai*[3] In my opinion, the Full Bench decision represents the correct position of law and I shall proceed to give my own reasons for the same. In the decision in *Nagar Mahapalika, Varnasi* v *Panna Lal*[4], it is stated that none of the witnesses examined on behalf of the prosecution has stated that kesari dal is used for human consumption On the other hand, in the Full Bench decision of the Kerala High Court, it is stated that it is common knowledge that kesari dal is

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1. (Crown Case Reserved, 1800 Russell & Ryan, 1)
2 (1951) S C J 735
3 (1965) M L J (Crl) 23 (F B)
4 A I R 1965 All 231

used as an article of human diet in many parts of the country and that no evidence is required to prove that it is an article of food any more than evidence would be required to prove that rice or milk is an article of food I have already referred to the passage in Modi's Medical Jurisprudence and Toxicology where it has been stated that kesari dal is an article of food in some parts of the country. But for kesari dal being an article of food, there would have been no necessity for the Legislature to frame rule 44-A of the Rules framed under the Act prohibiting sale etc. of kesari dal etc. Further, there is the evidence of P W. 1 that kesari dal is an article of food and the Courts below have found as a question of fact that kesari dal is an article of food

It is true that kesari dal is also used as fodder for cattle and I have also referred to the bills issued by the petitioners describing the article sold as cattle fodder. It is also true that sale as defined in section 2 (*xiii*) of the Act contains the qualification that the sale must be of an article of food and that it must be for human consumption or use But as pointed out in the Full Bench decision of the Kerala High Court the words "for human consumption or use" qualify the word "sale" and not the words "article of food" and that in the sale as defined in the Act, it is not necessary that the sale should be for human consumption or use. In *Public Prosecutor* v. *Palanisami*[1], Ramakrishnan, J., has pointed out that the definition of sale in section 2 (*xiii*) of the Act is very wide and covers not merely a sale for human consumption, but a sale for analysis as in this case, exposing for sale, or having in possession for sale, will all be brought within the scope of the definition of 'sale' It is pointed out in that decision that the crux of the offence is in the sale of food as defined in the Act and it is irrelevant to consider whether there was any separate understanding between the buyer and the seller at the time of sale that the article sold should be used for some purpose other than food and that the fact that it was agreed between the seller and the customer that an adulterated article sold was to be used for a purpose other than human consumption will not at all enter into the consideration whether an offence, as defined in the Act, has been made out or not The plea of the accused in that case was that he used to represent to his buyers that the particular asafoetida which he had in stock, should be used only for feeding cattle and not as human food and hence he would be exempt from prosecution In rejecting the plea, Ramakrishnan, J., pointed out that it would be as if a vendor of adulterated milk could aver that he sold adulterated milk to a customer on the distinct understanding that the customer should not give to his baby, but should give it only to his cat and therefore urge that he had not sold adulterated milk and had not committed any offence. In *Public Prosecutor* v. *Kachi Mohideen*[2], and in In re *Bhimaraju*[3], the accused pleaded that he kept the mixture of gingelly oil and groundnut oil not for sale as food, but for sale as lamp oil. The prosecution of the accused in those cases was under rules 27-A and 29 of the Rules framed under the Madras Prevention of Food Adulteration Act, corresponding to similar rules under the present Act It was pointed out in those decisions that the prohibition under the Prevention of Food Adulteration Act is absolute for whatever purpose the consumer may take it or the seller may sell it and that no person shall sell or have in his possession for purpose of sale a mixture of gingelly oil with groundnut oil For the foregoing reasons, I am unable to accept the contention of the learned Advocate for the petitioners that the sale of kesari dal to P.W. 1 in this case was not an offence as it was sold under a bill describing the article as cattle fodder.

The learned Advocates for the petitioners contended that a complete prohibition of trade in kesari dal which can be used as cattle fodder is void as it offends the fundamental right of the petitioners under Article 19 (1) (*g*) of the Constitution. But I am unable to accept this contention as the prohibition of sale of kesari dal *etc.*, would clearly come within the saving clause (6) of Article 19 of the Constitution. Even at the commencement of the judgment, I have pointed out the reason for fram-

1. A.I.R. 1965 Mad. 98.
2. (1947) 2 M.L J. 456.
3. (1949) 1 M.L J. 198

ing rule 44-A of the Rules framed under the Act, namely, that kesari dhal is found to be a poisonous foodgrain, the consumption of which would seriously affect the health of the consumers

For the foregoing reasons, the Courts below were justified in finding the petitioners guilty of the offence charged against them and I see no ground to interfere with the conviction of the petitioners But having regard to the facts and circumstances of the case, I think this is a fit case in which the petitioners who are first offenders should be dealt with under the provisions of the Probation of Offenders Act I, therefore, set aside the sentence of fine imposed on the petitioners and let off the petitioners with admonition, through their Advocates The fine amounts, if collected, are ordered to be refunded to the petitioners.

V K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— MR. JUSTICE P. S. KAILASAM.

Mangalathachi . *Appellant**

v.

K. R. Kalyanasundara Mudaliar and another .. *Respondents*

Madras Cultivating Tenants Protection Act (XXV of 1955)—Tenant put into possession by the usufructuary mortgagee—Discharge of the mortgage—Such tenant, if entitled to claim the benefits of Act

A lessee under the usufructuary mortgagee is not entitled to claim the rights of a cultivating tenant as against the mortgagor subsequent to the redemption of the mortgage

The tenancy agreement under the Act must be with the landlord in order to constitute a person with the status of a cultivating tenant under the Act A person would not normally be entitled to transfer any right to which he is not entitled An usufructuary mortgagee can only be in possession till the redemption of the mortgage He cannot confer the right on a tenant to be in possession for a longer period To hold that the mortgagee can confer on his tenant the right of a cultivating tenant would mean that he can transfer higher rights than he has and deprive the mortgagor of his right to possession. Unless the words in the statute are clear and specific, this construction will not be justified.

Appeal against the Decree of the Court of the Principal Subordinate Judge Kumbakonam, in Appeal Suit No. 116 of 1961, preferred against the Decree of the Court of the District Munsif of Kumbakonam in Original Suit No 80 of 1961.

N. Venkatarama Ayyar, for Appellant

G. Ramaswamy and *S. M. Subramaniam*, for Respondents.

The Court delivered the following

JUDGMENT —The plaintiff is the appellant. She executed a mortgage bond in respect of a land R. S. No 324/1, an extent of 33 cents in Thirupirambiam village on 15th April, 1944, in favour of one Mangalam Anni for Rs 200. It is admitted that the mortgage was taken for the benefit of the first defendant in the name of Mangalam Anni. Possession was delivered to the first defendant The plaintiff paid a sum of Rs 200 to the first defendant which according to him was due in respect of the mortgage on 30th April, 1959. The first defendant did not deliver possession of the suit land. Subsequently the plaintiff claimed for a return of Rs. 100 on the ground that she is entitled to the benefits of the Madras Agriculturists Relief Act. It is unnecessary to consider that question of benefit under the Madras Agriculturists Relief Act as it is not before me Possession was not delivered to the plaintiff, though the receipt of the sum of Rs 200 and discharge of the mortgage was admitted by the first defendant. According to the first defendant, he leased the suit land to the second defendant and on the discharge of the mortgage he directed the second defendant to attorn the lease to the plaintiff. According to the second defendant, he took the land on lease under the first defendant, the usufructuary mortgagee, and continued to be in possession. After the discharge of the mortgage, he attorned the lease to the plaintiff It was the case of the defendants that the plain-

*S. A. No. 755 of 1962. 2nd November, 1965.

tiff accepted the second defendant as a tenant. The second defendant raised the contention that he became entitled to the rights of a cultivating tenant on taking a lease from the first defendant, that subsequently he became a tenant of the plaintiff, and therefore, he cannot be evicted under the Madras Cultivating Tenants Protection Act The trial Court negatived the contentions of the defendants and gave a decree as prayed for by the plaintiff On an appeal, the lower appellate Court, while confirming the finding of the trial Court that the mortgage had been discharged, held that the plaintiff is not entitled to possession, as the second defendant acquired the rights of a cultivating tenant

In coming to the conclusion that the second defendant is a cultivating tenant, the lower appellate Court was inclined to accept the case of the defendants that the second defendant became a tenant under the plaintiff herself This finding is recorded in paragraph 12 of the lower appellate Court's judgment The evidence of the first defendant is that he asked the plaintiff to take possession of the land from the second defendant who was the lessee It is the case of the first defendant that the plaintiff agreed to do so But the plaintiff vehemently denied that she accepted the second defendant as her tenant It has not been found that the plaintiff accepted any rent from the second defendant It is also noteworthy that the second defendant has not stated in his evidence that the plaintiff accepted the rent or attornment of the tenancy by him The inference of the lower appellate Court that the plaintiff agreed to accept the attornment is not supported by the evidence and is based on surmises The fact that the plaintiff did not ask for possession from April, 1959 to October, 1960, would not prove the case of the second defendant that the plaintiff accepted him as his tenant. As already pointed out, the second defendant did not say that the plaintiff accepted him as a tenant The lower appellate Court has extracted the evidence of the first defendant that he asked the plaintiff to take possession of the land from the second defendant, and the plaintiff agreed to do so, and that he also directed the second defendant to pay rent to the plaintiff The lower appellate Court has not specifically accepted this piece of evidence In the absence of a specific finding regarding the evidence of the first defendant and in the absence of the second defendant's evidence that the plaintiff accepted him as his tenant, the finding which is purely based on surmises cannot stand

The question that arises for consideration is whether a tenant who was put into possession of the land by the usufructuary mortgagee, is entitled to claim the rights of a cultivating tenant, even after the discharge of the mortgage The plaintiff attempted to deny the fact of the first defendant admitting the second defendant as his tenant during the continuance of the mortgage But on this aspect the lower Court has recorded a finding that the first defendant admitted the second defendant as his tenant, when he was serving outside Thirupirambiam village The finding is supported by the evidence of defendants 1 and 2 and the letters (Exhibits B-1 to B-3) The finding which is one of fact cannot be disputed in Second Appeal. Therefore, the contention of learned Counsel for the appellant, Mr Venkatarama Iyer is that, the second defendant is not entitled to rights of a cultivating tenant, as he was not admitted into possession under an express or implied tenancy agreement with the landlord The learned Counsel for the appellant submitted that the definition of the word 'cultivating tenant' would indicate that the tenancy agreement must be with the landlord and not with the mortgagee who is a transferee only of a portion of the right of the landlord On the other hand, the learned Counsel for the respondents submitted that the definition of the word 'cultivating tenant' does not require that the tenancy agreement, express or implied should be with the landlord and that, if the tenant was inducted into possession lawfully by a person entitled to possession as by a mortgagee in this case, the second defendant would be a cultivating tenant.

An usufructuary mortgagee is entitled to retain possession of the property mortgaged to him and to receive rents and profits accruing from the property till the payment of the mortgage money The mortgagor is entitled to recover possession when the mortgage is discharged. The right of the mortgagee in possession to admit a

tenant cannot be disputed. The mortgagee cannot confer on his transferee a better title than what he possesses and therefore any lease by the mortgagee would cease when the mortgage is redeemed. But the Courts have recognised that any agricultural lease created by the mortgagee would be binding on the mortgagor even though the mortgage had been redeemed, provided the mortgagee as a prudent owner entered into the lease agreement in the ordinary course of his management. This is in the nature of an exception to the rule that the mortgagee cannot confer a bettet title than what he has.

The Madras Cultivating Tenants Protection Act, 1955, was enacted to protect cultivating tenants in certain areas in the State of Madras from unjust eviction. The cultivating tenant is defined as follows :—

"2 (*a*) 'Cultivating tenant' in relation to any land means a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied, and includes—

(i) any such person who continues in possession of the land after the determination of the tenancy agreement. . "

Landlord is defined thus:

"2 (*e*) 'Landlord' in relation to a holding or part thereof means the person entitled to evict the cultivating tenant from such holding or part . "

The definition of the word 'cultivating tenant' does not expressly require that the tenancy agreement, express or implied, should be with the landlord In *Ramaswami Naidu* v. *Marudaveera Moopan*[1], Balakrishna Ayyar, J , rejecting the contention that the tenancy agreement need not be with the owner of the land, held that a tenancy agreement meant an agreement creating tenancy and observed .

"A tenancy agreement means an agreement creating a tenancy and when we speak of a tenancy we normally understand that there is on the one side a landlord and, on the other side a tenant or lessee"

The same view was expressed by Ramachandra Iyer, J. (as he then was) in C.R.P. No. 604 of 1957, where he observed :

"The agreement contemplated in section 2 (*a*) of Madras Act XXV of 1955 whether it was, express or implied should be with the landlord directly"

This view has not been subsequently differed from, though a Division Bench in *Kathaperumal* v *Muthiah*[2], did not share the view regarding the status of a sub-tenant as against the chief tenant The view, therefore, of the Madras High Court is that the tenancy agreement, express or implied, must be with the landlord. In *Dahya Lala* v. *R M. Abdul Rahim*[3], the Supreme Court considered the rights of a person let into possession by the usufructuary mortgagee and held that the tenant is entitled to the status of a tenant under the Act. In the case before the Supreme Court, the owners of a property mortgaged it to one Umiyashanker with possession Shortly after the mortgage, the mortgagee inducted one Mohammed Abdul Rahim as a tenant on the land. The owners of the land applied to the Court for redemption of the property, and by an award made by compromise between the parties, it was declared that

'the land in dispute was in possession of Mohammed Abdul Rahim as tenant of the mortgagee, and that the mortgagor had the right to take possession of the land from the said tenant"

Mohammed Abdul Rahim was evicted. On appeal the High Court of Bombay ordered possession of the land to be restored to Mohammed Abdul Rahim declaring that he was entitled to continue in occupation as a tenant on the same terms on which he was a tenant of the mortgagee. Section 4 of the Bombay Tenancy and Agricultural Lands Act is in the following terms .

"A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not—(*a*) a member of the owner's family, or (*b*) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family, or (*c*) a mortgagee in possession "

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1 (1959) 1 M L J 25 at 27.
2 (1963) 1 M L J. 359.
3. (1963) 2 S C.J. 450.

Under the section a person is deemed to be a tenant if he is cultivating any land belonging to another person, provided he is not a member of the owner's family or a servant on wages or a mortgagee in possession. The Supreme Court, construing the section, held that a person who is deemed to be a tenant is manifestly a class apart from the tenant who holds lands on lease from the owner. Such a person would be invested with the status of a tenant, if three conditions are fulfilled—(*a*) that he is cultivating land lawfully, (*b*) that the land belongs to another person, and (*c*) that he is not within the excepted categories. The Supreme Court rejected the contention that a person can be said to be lawfully cultivating land within the meaning of section 4 only if he has derived his right to cultivate directly from the owner of the land and not from some other person who has a limited interest, such as a mortgagee from the owner But the section in the Madras Cultivating Tenants Protection Act is differently worded Under the Madras Act, a cultivating tenant is defined as a peson carrying on personal cultivation under tenancy agreement express or implied, whereas under the Bombay Act a person lawfully cultivating any land belonging to another person shall be deemed to be a tenant. Under the Madras Act there should be a tenancy agreement, express or implied, but under the Bombay Act it is enough if the person lawfully cultivates any land belonging to another. Thus a tenant under the usufructuary mortgagee who has right to be in possession would be a cultivating tenant under the Bombay Act. The Bombay Act does not require that the person should be cultivating under the landlord. It is sufficient if he is cultivating the land of another person lawfully Cultivation by a tenant of a land in possession of the usufructuary mortgagee or lessee would satisfy the requirements of the Bombay Act, whereas it will not satisfy the definition of a cultivating tenant under the Madras Act. As already pointed out, the Madras High Court has taken the view that the tenancy agreement must be with the landlord. A person would not normally be entitled to transfer any right to which he is not entitled An usufructuary mortgagee can only be in possession till the redemption of the mortgage He cannot confer the right on a tenant to be in possession for a longer period. To hold that the mortgagee can confer on his tenant the right of a cultivating tenant would mean that he can transfer higher rights than he has and deprive the mortgagor of his right to possession Unless the words in the statute are clear and specific this construction will not be justified.

The learned Counsel for the respondents relied on *Chinnappa Naicker* v. *A.P.C. Umapathy Nayagar*[1], and *Sirang Abdul Khadir* v. *Rajagopala Pandarayar*[2], for the contention that a power-of-attorney agent and receiver would come under the definition of landlord. Those decisions are obviously not applicable. In this case the lease is by the usufructuary mortgagee. He does not represent the landlord and he has got only part of right of the landlord. The learned Counsel for the respondents also relied on a decision of the Supreme Court in *Mahabir Gope* v. *Harbans Narain Singh*[3], in which it was held that where all the zamindari rights were given to the mortgagee, it might be possible to infer on the proper construction of the document that he could settle lands with tenants in the ordinary course of management, and that the tenants might acquire certain rights in the land in their capacity as tenants. This case has no application to the facts of the present case as it relates to zamindari tenure. On a discussion of the entire case-law cited before me, I have no hesitation in coming to the conclusion that a lessee under the usufructuary mortgagee is not entitled to claim the rights of a cultivating tenant as against the mortgagor subsequent to the redemption of the mortgage.

The appeal is allowed with costs The judgment and decree of the lower appellate Court are set aside and those of the trial Court are restored. No leave

V. S. *Appeal allowed.*

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1. (1959) 2 M L J 466
2. (1956) 1 M L J. 34.
3. (1952) S.C J 292.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR JUSTICE M. ANANTANARAYANAN AND MR JUSTICE P. RAMAKRISHNAN

P. Kasinathan and others .. *Petitioners**

v

The Chief Secretary to Government of Madras, Fort St George, Madras-9, and another .. *Respondents.*

Defence of India Act (LI of 1962), section 3 (2) (15) and Defence of India Rules, 1962—Rule 30 (4)—If ultra vires *and void on account of excessive delegation of legislative function—Order of detention under—Validity* —Mala fides *of an order of detention—When could be inferred—Power of review—If judicial or quasi-judicial.*

Constitution of India (1950), Articles 352 and 359—President's proclamation suspending enforcement of certain fundamental rights under Articles 14, 21 and 22 of the Constitution—Scope and effect.

Neither section 3 (2) (15) of the Defence of India Act, 1962 nor rule 30 (4) of the Defence of India Rules, 1962, is vitiated by the vice of excessive delegation or implied abdication of legislative function. Section 3 (1) of the Act invests the Central Government with wide and general rule making powers and the specific and circumscribed power given under section 3 (2) of the Act is without prejudice to the general power given under section 3 (1).

That Parliament did not provide specifically in the section itself as to the place of detention of a person or for service of the order on the detenue or for his removal, from one place to another could be justified on the basis that during an emergency the vigour of the Lists dividing the powers between the Union and the States will have to abate in view of the special provision in Article 353 of the Constitution. The words " apprehension and detention in custody " in section 3 (2) (15) of the Act necessarily implies that the detention should be according to the Rules made by the rule-making authority Matters relating to the place of detention or the conditions under which a person is to be detained or the discipline to be enforced are matters of detail which can be properly delegated to a rule-making authority. It is hardly necessary that the Legislature should expressly specify these terms in the statute itself. If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance to the proper and effectual performance of the work which the statute has in contemplation, the Courts are at liberty to infer that the statute by implication empowers that detail to be carried out It cannot be said that a detenue could be starved to death merely because the Legislature has not provided a condition for giving food to the detenue

A detenue is not a ' prisoner ' at all and the place of his detention is not a ' jail ' within the meaning of the terms in the Prisons Act, 1894 Nor is the Prisoners Act, 1900 exhaustive of all the categories of persons who could be lodged in prisons A detention order would be sufficient authority for the officer-in-charge of the jail to receive in jail the person specified in such order Neither the power of detention nor the exercise of such power under the Defence of India Act and Rules could in any way be vitiated by the special provisions of the earlier Acts like the Prisons Act or the Prisoners Act.

That the orders of detention were made on the eve of an impending Election, that they were issued *en-masse* on the same date, in stereo-typed forms, on a number of leaders of a particular political party or that they were made on information from a variety of sources including ' intelligence reports ' cannot by themselves make the detention orders *mala fide* or *ultra vires*, if substantially the orders were made after due consideration and individual satisfaction When once the order of detention is valid, the subjective satisfaction of the Government as to its necessity cannot be canvassed by the Courts To detain a person merely on the ground that he is a member of a particular political group, without consideration of his participation in the activities of that group would certainly be illegal But where the activities of a particular political group is considered prejudicial, there will be nothing *per se* illegal in the Government considering the detention of members of that group. While the knowledge of the activities of a particular group would be a relevant fact which the Government may take into account, the detention order in each individual case should be on the subjective satisfaction of the concerned Government

The powers of review vested in the Government to review cases of detention is a real substantial right of the detenue and it ought not to be exercised as a mechanical formality Though it is not a necessary condition, still it would be highly desirable if the detenue is afforded an opportunity to make his representation at the time of review. But an order of review under the Defence of India Act is not a judicial or quasi-judicial act but is an executive one.

(Case-law reviewed and discussed—Facts which would vitiate an order considered—Technical errors and procedural irregularities as affecting orders discussed.)

The Proclamation by the President of India under Article 359 of the Constitution of India suspending the enforcement of the fundamental rights conferred by Articles 14, 21 and 22 of the Constitution during the period when the Proclamation of Emergency is in force, by detenues under the Defence of India Act and Rules cannot be invoked as a bar in cases where the detenue contends

* W. P. Nos 791, 875, 1172, 1500 to 1531, 1659 to 1696 of 1965.

13th December, 1965.

that his detention is illegal as contravening the mandatory provisions of the Act or his detention is *mala fide* or that the operative provision of law under which he is detained suffers from the vice of excessive delegation of legislative function These are not in terms pleas relateble to the Fundamental Rights specified in the President's Order

Petitions under Article 226 of the Constitution of India praying that is the circumstances stated therein and in the affidavit filed in each of the petitions, the High Court will be pleased to issue writs of *habeas corpus* for production of the petitioner in each of the petitions before Court by the Respondents in all the petitions and for a direction that the petitioner in each of the petitions be set at liberty, etc

V. G. Row for *Row & Reddy*, *M K Nambiar*, *A M. Kothandaraman* and *V Murali*, for Petitioners.

The Public Prosecutor, (*V. P. Raman*) for State.

The Judgment of the Court was delivered by

Anantanarayanan, J —This group of Writ Petitions under Article 226 of the Constitution for the issue of writs of *habeas corpus* in the concerned cases, raises questions of the constitutional propriety, legality and good faith of the relevant detention orders made by Government against the writ petitioners (detenus), which are of considerable interest and significance. We might immediately state that, in all the cases, the orders of detention purport to have been issued under Rule 30 (1) (*b*) and Rule 30 (4) of the Defence of India Rules, 1962 , in all of them, the Government of Madras state to be satisfied that the detention of the concerned detenu was necessary, in their view, to prevent him "from acting in any manner prejudicial to the Defence of India and public safety".

Before proceeding to a scrutiny of the grounds upon which the orders of detention have been challenged, we might briefly state that Sri M K. Nambiar has addressed arguments to us challenging the validity of Rule 30 (4), in the context of section 3 (2) (15) of the Defence of India Act, on grounds of abdication of legislative function or the vice of excessive delegation. Sri M. R Venkataraman, detenu, has addressed arguments in person on alleged grounds of *mala fide* or the colourable exercise of power, with regard to the orders of detention, also assailing those orders upon related grounds, such as the detention of the writ petitioners in prison against the spirit and purport of the delegated power, restrictions imposed in violation of section 44 of the Defence of India Act, the illegality of the subsequent orders of review made without an opportunity given to the detenue, to show cause against the continuance of the detention, the service of detention orders in some cases on persons already in jail custody, contrary to law, etc Sri V G. Rao, for certain of the detenus, has also advanced arguments upon subsidiary grounds, and on the facts of some of the individual instances

At the very outset, it is essential to elucidate, with care and precision, the ambit of the power of this Court to interfere with such orders of detention under Article 226 of the Constitution, in the context of the Emergency now prevailing under Article 352, and the Presidential Orders suspending the enforcement of certain fundamental rights, by virtue of Articles 358 and 359. We might immediately add that this matter has received elaborate exposition in four recent decisions of the Supreme Court, namely, *Makhan Singh Tarsikka* v *The State of Punjab*[1], *Anandan Nambiar* v *The Chief Secretary, Government of Madras*[2], *A K Gopalan* v *The Government of India*[3], and *Dr Ram Manohar Lohia* v. *The State of Bihar*[4] The text of the Proclamation of the President will be found in Basus Commentary on the Constitution of India (Fourth Edition), Volume V, page 194 and is as follows.

"In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person to move any Court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (IV of 1962) or any rule or order made thereunder"

1 A I R 1964 S C 381 at 400 and 401
2 A I R 1966 S C. 657.
3. A I R 1966 S.C. 816.
4 A.I R 1966 S C 740

It is not disputed that the ambit of the power of this Court to interfere with an order of detention made under section 3 (1) and section 3 (2) (15) (i) of the Defence of India Act, read with Rule 30 (1) (*b*) and Rule 30 (4) of the Rules made under the Act, in the context of the above Proclamation, has been fully considered by their Lordships of the Supreme Court in *Makhan Singh's case*[1]. For this reason, a terse statement of the position, as evident in the judgment will be necessary. After setting forth the text of section 3 (1) and section 3 (2) (15) (i) of the Defence of India Act, the Supreme Court proceeded to discuss the grounds open to citizens to challenge the legality or propriety of a detention either under section 491 (1) (*b*) of the Code of Criminal Procedure, or under Article 226 of the Constitution The following passages, which are brief and essential experts from this judgment, outline the entire situation :

" Let us take a case where a detenu has been detained in violation of the mandatory provisions of the Act In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provisions of the Act have been contravened Such a plea is outside Article 359 (1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order

Take also a case where the detenu moves the Court for a writ of *habeas corpus* on the ground that his detention has been ordered *mala fide* It is hardly necessary to emphasise that the exercise of a power *mala fide* is wholly outside the scope of the Act conferring the power and can always be successfully challenged. It is true that a mere allegation that the detention is *mala fide* would not be enough; the detenu will have to prove the *mala fides* But if the *mala fides* are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Article 359 (1) and the Presidential Order. . ...

There is yet another ground on which the validity of the dentention may be open to challenge If a detenu contends that the operative provision of the law under which he is detained suffers from the vice of excessive delegation and is, therefore, invalid, the plea thus raised by the detenu cannot at the threshhold be said to be barred by the Presidential Order. In terms, it is not a plea which is relatable to the fundamental rights specified in the said Order. It is a plea which is independent of the said rights and its validity must be examined . ...

In the present cases, one has merely to read section 3 (1) and the detailed provisions contained in the several clauses of section 3 (2) to be satisfied that the attack against the validity of said section on the ground of excessive delegation is patently unsustainable Not only is the legislative policy broadly indicated in the Preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority, that it would be idle to contend that the Act had delegated essentially legislative function to the rule-making authority In our opinion, therefore, the contention that section 3 (2) (15) (1) of the Act suffers from the vice of excessive delegation must be rejected "

(Upon this particular extract, we may observe that the argument repelled by the Supreme Court, in this context, is different from the attack which has been put forward by Sri Nambiar on the vice of excessive delegation As a careful perusal of the judgment will show, what was argued was that the apprehension and detention itself, by the Authorities of the Executive, were illegal, because of an abdication of legislative function, or excessive delegation. What is now argued is that the detention of such persons in jail, subject to the terms and conditions imposed by the State Government contravenes the law, as section 3 (2) (15) (i) refers merely to the apprehension and detention in custody of any person, and not to the terms, conditions or place of such detention)

" If we had held that the impugned provision in the Act suffered from the vice of excessive delegation, it would have become necessary to consider what the effect of that conclusion would have been on the merits of the controversy between the parties .. .. the question would have arisen whether in challenging the validity of the order of detention passed against him the detenu is enforcing his fundamental right under Article 21 of the Constitution. Article 21 is one of the articles specified in the Presidential Order and if at any stage of the proceedings, the detenu seeks to enforce his right under the said article, that would be barred . We do not propose to express any opinion on this question in these appeals Since we have held that the Act does not suffer from the vice of excessive delegation as alleged, it is unnecessary to pursue the enquiry as to whether if the challenge had been upheld, the detenu would have been precluded from urging the said invalidity in support of this plea that his detention was illegal. "

A word is now necessary concerning the other three decisions of the Supreme Court that we have earlier specified. In *Ananda Nambiar* v *The Chief Secretary, Government of Madras*[2], persons situated precisely like the present writ petitioners, and

1 A.I.R. 1964 S.C. 381. 2 A.I.R. 1966 S.C. 657

detained under identical ordersof detention by the Government of Madras, moved the Supreme Court assailing the orders The Judgment traverses grounds relating to the validity of Rule 30 (1) (*b*) of the Rules, the privileges of Members of Parliament, and related aspects which do not immediately concern us But the aspect of *mala fides* was also adverted to, and it was claimed that the Chief Minister of Madras made the orders in question, without satisfying himself concerning their justification. Certain statements of the Union Home Minister in Parliament were relied upon, as supporting this argument, and they have been extracted in the judgment An affidavit by the Chief Minister of Madras and another by the Chief Secretary to the Government of Madras were filed, and extracts from both appear in the judgment. The Supreme Court finally held that there was no justification for the assumption that the detentions were ordered by the Chief Minister of Madras without proper subjective satisfaction Their Lordships also expressed that there was no substance in the grievance that the impugned orders were made *mala fides ;* in result, the writ petitions were dismissed In *A. K. Gopalan* v *The Government or India*[1], issue of *mala fides* was also raised, and certain of the pleas, such as the simultaneous issue of a number of orders of detention on the same date, as indicative of an absence of a proper subjective satisfaction, are applicable to the present proceedings also. Finally, the contentions of illegality and *mala fides* were rejected, and the petitions were dismissed In *Ram Manohar Lohia* v *The State of Bihar*[2], the order of detention was held to be illegal, and the true ground therefor appears in a brief report of the case made available to us by the learned Public Prosecutor (Supreme Court Notes, 1965), as well as in some extracts from the judgments placed before us ; what was held was that the actual order of detention in the case was not in terms of the rule (Rule 30 (1) (*b*)), and was hence invalid Hidayatullah, J., observed .

> " When the liberty of the citizen is put within the reach of authority and the scrutiny from Courts is barred, the action must comply not only with the substantive requirements of the law but also with those forms which alone can indicate that the substance has been complied with "

We propose, first, to examine the entire legal argument of the attackupon Rule 30 (4), either because of the vice of excessive delegation, or the alleged abdication of the legislative function, and the related arguments of the *ultra vires* character of the orders of detention, because they were passed *en masse*, in order to put into custody the active members of an opposition political group (Members of the Left-wing Communist Party), the illegallity of the detention of such persons in jail, and defects or illegalities in the actual orders vitiating them or the service of such orders on persons already in custody , this group of arguments might be termed the arguments at law. The arguments on issues of fact, particularly, *mala fides*, are separate and conveniently admit of separate treatment Finally, we have the canvassing of the facts in certain individual cases, which are peculiar to those cases

The Defence of India Act, 1962, sets forth, in its Preamble that it was found necessary,

> " to provide for special measures to ensure the public safety and interest the Defence of India and civil defence and for the trial ofcertain offences and for matters connected therewith".

Section 3 (1) of the Act states that the Central Government may make such Rules,

> " as appear to it necessary or expedient fot securing the Defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operation ...'

According to section 3 (2) of the Act:

> " Without prejudice to the generality of the powers conferred by sub-section (1), the Rules may provide for and may empower any authority to make orders providing for, all or any of following matters . . . "

Section 3 (2) (15) (i) runs :

> " Notwithstanding anything in any other law for the time being in force (the Rules may provide for) the apprehension and detention in custody of any person whom the authority empowered by the Rules to apprehend or detain suspects, on grounds appearing to that authority to be reasonable, of being of hostile origin or having acted, acting being about to act or being likely to act in a manner prejudicial to the defence of India and civil defence, the security of the State, the public safety

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1 A I R. 1966 S C 816 2. A.I R. 1966 S C 740

or interest, the maintenance of public order, India's relations with foreign states, the maintenance of peaceful conditions in any part or area of India or the efficient conduct of military operations. .. "

While on the Act itself, we might also glance at section 44, which states that the authority or person acting in pursuance of the Act " shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonent with the purpose of ensuring the public safety and interest and the defence of India and civil defence ". Under section 45 (1),

"No order made in exercise of any power conferred by or under this Act shall be called in question in any Court "

The substance of Sri Nambiar's argument is that *Makhan Singhs' case*[1], from which we have set forth extracts earlier, does not deal with the *vires* of Rule 30 (4), framed by virtue of powers under section 3 (2) (15) (i) of the Act, on the principal aspect now relevant. Rule 30 (4) reads

" So long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be detained in such place, and under such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline, as the Central Government or the State Government, as the case may be, may from time to time determine "

The argument is that section 3 (2) (15) (*i*) of the Act makes no reference whatever to the terms and conditions of detention ; therefore, Rule 30 (4) proceeds beyond the ambit of the delegated power and is *ultra vires* Alternatively, such a delegation must be held to amount to an abdication of an essential legislative power This is shown by the following features of the Constitution itself In the Seventh Schedule, List I, item 9, we have the entry "Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India, persons subjected to such detention " Likewise, in the Concurrent List III, item 3, we have " Preventive detention for reasons connected with the security of a State. persons subjected to such detention " It is significant that, in both Entries "persons subjected to such detention " is a separate head of legislation That can only imply that the Legislature must enact terms and conditions for detention of persons, upon whom orders of detention had been already served This essential legislative function cannot therefore, be delegated to the rule-making authority. Since, in terms of the criteria laid down in *Makhan Singh's case*[1], such a ground of attack in open to the writ petitioners, the orders of detention must be quashed and the writs allowed

The matter is carried still further by Sri Nambiar on the ground that detention in jail would, in any event, be illegal, in terms of the delegated power. In the State List (List II of the Seventh Schedule) item 4 is "Prisons, reformatories, borstal institutions and other institutions of a like nature, and persons detained therein". This division of powers illustrates that persons preventively detained under either the Preventive Detention Act, or under the Defence of India Act and Rules, cannot be kept in jail , as there are two separate "Entries", there should be a harmonious interpretation, modifying the language of one by the other. The following authorities are referred to in support. In *Stewart* v. *Brojendra Kishore*[2], the Judges held that this should be the true canon of interpretation in such a context Again, in In re, *C P Motor Spirit Act*[3], the Judges held that where there is an apparent conflict of power in the Entries, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other, the reason is that it could not have been the intention that a conflict should be perpetuated. The third authority is *Subramanya* v. *Mutuswami*[4]. Reference has also been made to the following enactments, namely, the Prisons Act IX of 1894, section 3 of the Prisons Act III of 1900, and Madras Regulation II of 1819 But, these laws may require some separate discussion, when we consider the arguments of Sri V.G Rao upon the same, head, and we shall not proceed into this for the present.

1. A I R 1964 S C 381
2. A.I R 1939 Cal 628 at 634
3. (1937) 38 F L J (F C) 1 (1938) 39 F L J (F C) 6 (1939) 1 M L J (Supp) 1 1939 F C R 18
4. (1940) F C R 188 (1939) 40 F L J (F.C) 157 (1941) 1 M L J (Supp) 1.

We have very carefully considered the arguments of Sri M K Nambiar, on this aspect, and we are unable to hold that either section 3 (2) (15) (i) or Rule 30 (4), or both, can be said to be vitiated by the vice of excessive delegation, or implied abdication of legislative function It is noteworth that in *Makhan Singh's case*[1], this precise argument was repelled by the Supreme Court, though it does not appear to have been pressed on the ground now advanced. We must here emphasise the significance of the terminology of section 3 (1) itself, which invests the Central Government with a general power to make Rules for the wide purposes specified in that sub-section ; section 3 (2) commences "Without prejudice to the generality of the powers conferred by sub-section (1)". In *Emperor* v *Sibnath Banerji*[2], the Judicial Committee were concerned with the almost identical language employed in section 2 (1) and section 2 (2), Entries 5 and 10, of the Defence of India Act, 1939 and with rule 26 framed under the Act, which corresponds to the present rule 30. The Judicial Committee observed :

"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-section (1) and (2) of section 2, Defence of India Act, and Counsel for the respondents in the present appeal was unable to support that statement, or to maintain that rule 26 was invalid In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one , the rule-making power is conferred by sub-section (1) . .. There can be no doubt—as the learned Judge himself appears to have thought—that the general language of sub-section (1) amply justifies the terms of rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2)."

If this is applicable to the present situation, it would clearly imply that not merely Rule 30 (1) (b) of the Rules, which authorises the detention, but also Rule 30 (4), in its terms, could be justified, on the generality of the power under section 3 (1) of the Act, even apart from the circumscribed and separate specifications of that power under section 3 (2) (15) (i) etc. Sri Nambiar has drawn and stressed an interesting parallel, between the Defence of India Act and the Preventive Detention Act IV of 1950. It is certainly significant that, under section 4 of the latter Act, there is statutory provision for the detention, in a prescribed place, of the person on whom the order has been served, or for removal of such detenu from one place of detention to another. But, we are unable to hold that the Legislature was not justified in taking a wider sweep when enacting the Defence of India Act, without making a separate legislative provision for the place and terms of the detention The learned Public Prosecutor would appear to be justified in his argument that, during the emergency, the rigour of the Lists cannot be said to subsist unabated, in view of the specific terms of Articles 353 of the Constitution Article 353 is also relevant upon the other argument, that the orders of detention have not been made upon the subjective satisfaction of the Government of Madras, or should be presumed not to have been so made, in view of certain specific passages in the speeches of the Union Home Minister in Parliament, which preceded the Orders Certainly, Article 353 (a) explicitly states that the executive power of the Union extends, during an emergency, to giving directions or instructions to a State Such legislative provisions, as the Entries referred by Sri Namibar, do not necessarily imply a legislative obligation to enact upon the topic.

Upon one aspect, this entire matter was examined by the Full Bench of the Lahore High Court in *Harikishan Das on behalf of Durga Das* v. *The Crown*[3]; that related to sections 2 and 3 of the Defence of India Act, 1939, and an order of detention under rule 26. Section 2 (2) (x) corresponded to our present section 3 (2) (15) (i), and the precise argument was that rule 26 exceeded the rule-making power. Reference was also made to Entries in the Seventh Schedule of the Government of India Act. Harris, C J., observed :

"The conditions of detention, such as the place of detention, the conditions under which a person is to be detained, the discipline to be enforced during detention and such like are matters of detail which, in my view, can be rightly delegated to a rule-making authority, and need not be dealt with in the statute itself It is to be observed that the statute does lay down a general principle to guide authorities . ... "

1. A I R 1964 S C 381 1945 F L J 22 1945 F C R 195
2. L R. 72 I.A 241 (1945) 2 M L J 325.
3 (1943) I L R 25 Lah 245 (F B)

We think that, even apart from any other consideration, the very words of section 3 (2) (15) (*i*), namely, " apprehension and detention in custody " of the person referred to, necessarily imply that the detaining authority must detain that person under such terms as to maintenance and discipline, as the rule-making authority may specify, it is hardly a reasonable requirement of the Legislature, that the Legislature should expressly specify these terms in the statute, and the broad purport thereof would seem to be necessarily implied. During the course of arguments, for instance, we had to consider the logical outcome of the argument of Sri Nambiar, if the apprehension and detention were under the law, but the rule-making authority could specify no terms as to place of detention or maintenance of the detenu, because the broad power had not been the subject of legislation, did it imply that the detenu could be kept in any mode, without reference to civilised usage ?. This necessarily involves the *vires* of the Security Prisoners Rules, 1963, promulgated by Government, a copy of which is before us, and which form also the subject of argument. We are fortified in our view of the necessary implication of this power in section 3 (2) (15) (*i*), because of the judgment of the Supreme Court in *Sanzgiri's case*[1] This related to a detenu who wrote a book in Marathi, the title of which could be translated as ' Inside the Atom ', and which was an unobjectionable scientific work, designed to disseminate knolwedge regarding the Quantum Theory. The authorities declined to forward the manuscript for publication, because the relevant rule gave the detenu no such right, nor did it impose on the authorities any corresponding obligation. The Supreme Court observed that the Bombay Conditions of the Detention Order, 1951, are not privilege conferred on the detenu, but the terms of the restriction on his liberty Hence, since there was no term prohibiting the detenu from writing such a book or sending it for publication, the authorities could not prevent the sending of the book for publication. Their Lordships observed that if the view were to be upheld that the Rules conferred only privileges, " it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu".

Where an Act confers a jurisdiction, it impliedly also grants the power of doing of such acts, or of employing such means, as are essentially necessary to its execution. Thus, an Act which empowered the Justices to require persons to take an oath as Special Constables, and gave them jurisdiction to inquire into an offence, impliedly empowered them to apprehend the persons, who unlawfully failed to attend before them for those purposes *Attorney-General* v *Fulham Corporation*[2]. The principle is expounded in Maxwell's Interpretation of Statutes (11th Edition), page 350 In Craies on Statutes (5th Edition) page 105, it is observed

> " If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance to the proper and effectual performance of the work which the statute has in contemplation, the Courts are at liberty to infer that the statute by implication empowers that detail to be carried out "

Thus, in *Cookson* v *Iee*[3], a private Act vested certain lands in trustees for the purpose of enabling them to sell the lands for building purposes, but the Act contained no express power to expend any portion of the purchase-moneys in setting out the lands, or in making road Under those circumstances, the Court held that, having regard to the object of the Act, such power ought to be implied For these reasons, we are of the view that Rule 30 (4) cannot be struck down as vitiated by the vice of of excessive delegation We need not, hence, consider the further argument of the learned Public Prosecutor that, even on the assumption that the vice exists, this would necessarily imply the invoking by the detenu of Article 21 in his favour, which is barred by the Presidential Proclamation, a question that has not been answered in *Makhan Singh's case*[4]

Sri V G Rao has submitted certain arguments upon the power of the State Government to frame such Rules. But, if Rule 30 (4) is valid, the place of detention

1 Crl A No 107 of 1965.
2 L.R. (1921) 1 Ch 400
3 23 L.J. Ch 473
4 A I R 1964 S C 381.

and the terms of detention may be determined either by the Central Government or the State Government, as the case may be

Sri M R. Venkataraman has taken us through the actual Rules (Security Prisoners Rules, 1963), and pointed out certain rigours and defects therein, virtually reducing a security prisoner to the status of a convicted criminal. Particular stress is laid, for instance, on Rule 17, sub-rule (vi), which renders the security prisoner liable for punishment, if he disobeys "the orders of any officer of the jail" We think it is sufficient to indicate, in this context, that persons detained under the Defence of India Act, are certainly not prisoners in the ordinary sense, and the place of detention is, again, not a jail in the ordinary sense , these are the very arguments of the learned Public Prosecutor for the State, as we shall presently show. That being the case, these Rules ought to be framed, taking the special context into consideration, and, if they require any modification, in any respect, a review of the entire set of regulations at a high level would appear to be very desirable

Both Sri Rao and Sri Nambiar have stressed the illegality of the detention of the writ petitioners in jail, in the context of certain provisions in certain prior Acts, and legal character of this particular exercise of the power This has been stressed, even apart from the argument upon the vice of excessive delegation The Prisons Act IX of 1894 defines a "prison" as a jail or place for the detention of prisoners. There is a definition of "Criminal Prisoner" under section 3 (2), and the learned Public Prosecutor stresses that a detenu is not a 'criminal prisoner' According to him, that is by no means an exhaustive category, and the definition of a 'civil Prisoner' in section 3 (4) of the same Act is much wider, excluding a 'Criminal Prisoner' The following authorities have been relied upon by the learned Public Prosecutor for the proposition that a detenu would not be a prisoner at all, nor could the place of his detention be termed a 'jail', in the strict sense, apart from mere nomenclature , vide *Taherally* v. *Chanabasappa*[1], *Maqbool Hussain* v *State of Bombay*[2], and *Biyai Bahadur* v *State*[3]. Sri Nambiar has contended that, under section 3 of the Prisoners Act, 1900, an officer in charge of a prison has authority to receive and detain only persons duly committed to his custody, under the Act or otherwise, by any Court, according to the exigency of any writ, warrant, or order. How, it is argued, could the Superintendent of the concerned jails, in the present cases, receive the petitioners and take them into custody when the detention has been directed neither by a Court nor under the Prisoners Act III of 1900 ? But, we do not find this to be a really substantial ground of attack The Prisoners Act may not be exhaustive of all the categories of persons who could be lodged in prisons The detenu has to be detained in some place or other, as specified by the authority, which also might subserve the security purposes of the State They are not prisoners, and, as the learned Public Prosecutor has stressed, political or security prisoners would appear to have been lodged in jails ever since 1819 The Madras State Prisoners Regulation, 1819, has been referred to, in this context, and also with regard to the obligation to periodically review the detentions, enacted in section 3 of this Regulation. This Regulation prescribes a warrant of commitment, and, obviously, the procedure may vary or evolve, upon such an aspect The detention order would be sufficient authority for the Government Officer in charge of the jail, to receive the persons specified in such orders.

We may now proceed to the aspect of *mala fides*, and to certain arguments which are subsidiary under that main head The entire argument could be summarised and set forth as follows

According to Sri M R. Venkataraman, the exercise of the power by the State Government in the present cases must be held *mala fide* or colourable, on a variety of grounds Reliance is placed on *Pratap Singh* v *State of Punjab*[4], for the view that the grounds of *ultra vires* and that of *mala fides* are often inextricably mixed *Mala fides* need not necessarily relate to the deliberate misuse of power against an

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1 A I R 1943 Bom 226
2 1953 S C J 456 (1953) 2 M L J 113
3 A I R 1954 All 626
4 A I R 1964 S C 72

individual, from private motives, by a Minister or Authority of Government. Indeed, Sri Venkataraman has been at pains to assure us that, to his knowledge, no such factor has been operative in any of the present cases But, if the power is exercised for a purpose other than that for which it was intended, embodied in statute or rule, that would be a case of fraud on power In that sense, it would be *mala fide*, and would be liable to be struck down by Courts. According to the argument, the power was used, in the present case, to paralyse the activities of an opposing political group (Left-wing Communist Party) from ulterior considerations. The Kerala Elections were due to take place in February, 1965, and these wholesale arrests and detentions took place on 29th December, 1964, and a few days thereafter, in order to cripple the party in its election prospects there, as the Congress Authorities considered Kerala a test case. The left-wing Communist Party, which was designated as a pro-Peking group, as will be clear even from the arguments submitted before the Supreme Court in *Anandan Nambiar's case*[1], had actually issued several statements and resolutions of strong support to the maintenance of the territorial integrity of India, both as regards Pakistani aggression and as regards the Chinese aggression The epithet ' Pro-Peking ' is unjust and undeserved, and the party was merely given a bad name, in order to paralyse its activities The statements made by the Union Home Minister indicate that the Central Government had decided to imprison all prominent members of this party, for political grounds , the subjective satisfaction of the Madras Government or its Chief Minister was really illusory, and did not exist The above orders were passed on the same day, and the entire approach was that prominent members of the party should be arrested and detained *en messe*, because of such membership There was no possibility of individual satisfaction, and this is really a question of *ultra vires* The Defence of India Act does not permit members of a party, as a group, to be detained , the power relates to individuals alone, whose activities were or might be considered objectionable The orders were issued on cyclostyled forms, and names might even have been erroneously included. The review orders passed on 30th May, 1965, were on printed forms, issued simultaneoulsy There was nothing particularly significant in the border situation as regards China in December, 1964, when the orders were passed making specific reference to the defence of India Certain passages in the affidavit of the Deputy Secretary to Government (Sri Belliappa) are relied on, as indicative that the entire perspective was that of paralysing the group Particular stress is laid on one passage, which is to the effect that where a large group of politically active persons is considered by Government, acting on the basis of information, as liable to endanger the peace and security of the State, individual orders of detention on members of such a group can be validly and legally made

The other grounds of objection are (1) From the counter-affidavit filed on behalf of the Government, it appears that there was no satisfaction on the question whether the detention was necessary for the defence of India Reference was made to the security of the State in more than one passage, and this consideration renders the order of detention illegal . vide *Ram Manohar Lohia's case*[2] (2) The review orders under Rule 30-A are illegal, because no opportunity was given to the detenus to show cause against the continuance of the detention The review is of a judicial character, or at least quasi-judicial in character, and the principle of *audi alteram partem* should have been observed (3) Reference to " intelligence agencies" in the counter-affidavit indicates that the detentions were merely ordered on Police reports That is illegal, on the authority of *Emperor* v *Sibnath Banerji*[3]. (4) Section 44 of the Act has been violated, as persons have been detained who are from several social strata of widely different avocations, and the normal avocations of all of them have been totally frustrated , vide *Godavari* v. *State of Maharashtra*[4]. The detenus include a Law student, petty traders and minor employees (5) Service of detention orders upon some persons, who were already in jail, is contrary to law.

1. A I R. 1966 S C 657.
2. A I.R 1966 S C. 740
3. L R 72 I A 241 . (1945) 2 M L J. 325 : (1945) F L J. 222
4. (1965) 2 S C J. 523 : (1965) M L J (Crl) 765.

We shall deal briefly with these arguments, upon the aspect of *mala fides* and the related subsidiary aspects We shall refer, to the degree which is essential, to the issues of fact, as evident from the materials placed before us But we must make it plain that, as we comprehend the ambit of our power, once Rule 30 (4) is held valid the subjective satisfaction of the Government cannot really be canvassed by us As observed by one of us in *Thangamani* v. *Government of Madras*[1], in terms of section 45 (1) of the Defence of India Act, 1962, even section 44 would appear to be directory and not mandatory in character, though, certainly, this does not imply that the directive can be set at naught or disregarded by the Executive, in making orders of detention

It is very difficult for us to canvass the aspect of the extent to which the left-wing communist party, to which the detenus belong, was really in co-operation with the Central Government, and, indeed with almost the entire nation, in the matter of its attitude to Chinese and Pakistani aggression. Certain public statements and declarations of the Party have been made available to us, in this context. They include references to the territorial integrity of India, and the imperative need to preserve that integrity According to the learned Public Prosecutor, they significantly do not contain any explicit and categorical denunciation of Chinese aggression, upon the borders of this country. Again, the professions and the practice or activities of a political party, or its members, may be at variance. As regards the activities Government may receive information from a variety of sources, which may include what are termed as ' intelligence reports ' We do not see how all this could be canvassed in a Court of law, except, perhaps, to reinforce a conceivable argument that the power to detain was being used *mala fide*. During the emergency, a situation fraught with potential danger, such as a border situation, may have to be judged, not merely with respect to its temporary quiescence, but its possible future developments The Courts are not at all advantageously situated to proceed into such issues of fact, and to assess the wisdom of the Executive in taking a particular course of action We think it is sufficient to state that, upon none of the grounds of fact adverted to by Sri M. R. Venkataraman, we are able to hold that the action of the Government was *mala fide*. The Kerala elections, though due in February, 1965, were over long previously, which the orders of review were made in these cases, continuing the detentions in a large number of cases Many, or most, of the persons detained, could hardly have affected those elections in another State, by active intervention or speeches in the course of the campaign A consideration of all the factors, and a consideration of each individual case, could well have preceded the simultaneous issue of orders of detention on a particular date ; a fairly obvious rule of administrative exigency seems to have led to the promulgation of simultaneous orders Such matters as the use of cyclostyled forms, or printed forms in review cases, cannot affect the legality of the orders if, substantially, there was individual satisfaction or due consideration. The learned Public Prosecutor relies on the following authorities in support of this contention, namely, *Stuart* v. *Anderson and Morrison*[2], *Kamla Kant* v. *Emperor*[3], *Emperor* v *Sibnath Banarjee*[4], and *A K Gopalan* v *The Government of India*[5]

We think that a word is necessary about the main argument on the matter of *mala fides*, that the perspective of approach has been erroneous. It is argued that it is *ultra vires* and amounts to a colourable use of power, that the power to detain should be exercised *en masse*, with respect to members of a particular political group, though the outward semblance or form may be that of individual satisfaction. The passage in the affidavit of Sri Belliappa, that we have earlier referred to, is cited in support. The two English decisions placed before Court by the learned Public Prosecutor (apart from the well-known decision *Liversidge* v *Anderson*[6], are also distinguished on this aspect In *Rex* v *Secretary of State for Home affairs, Iees*,

1 (1965) 1 M L J 486 (1965) M.L.J (Crl) 258
2 (1941) 2 All E R. 665
3 A I R 1944 Pat 354
4 (1943) 2 M L J. 468 (1943) F L J (F.C) 151 1944 F C R 1
5 A I R 1966 S.C. 816
6. L.R. (1942) A C 206. (1941) 3 All E R. 338

Ex parte[1], the Regulation in question empowered the Executive to detain a person, because he was a member of a group with objectionable activities. In contrast, the argument is that the Defence of India Act refers only to the detention of individuals, whose activities are objectionable In *Stuart* v *Anderson and Morrison*[2], the order of detention was held not invalid because it was a general one, and common to all the individuals whose names were set out in the Schedule to the order We think it is sufficient to point out that a refinement or distinction applies here, which, as a question of fact, we have no reason to think was ignored, in the present instances If we suppose that the activities of the members of a particular group were prejudicial to the safety of India, we do not think that it could be contended, for a moment, that the Executive would not be justified in considering the detention of the members of that group It cannot be argued that such a perspective of approach, *per se*, is erroneous or opposed to the Defence of India Act and the Rules. But, when detaining each individual, the consideration ought to be the subjective satisfaction that such an individual, as a member of the group, had also indulged in objectionable activities, or was likely to do so To detain him *qua* membership of the group, and without consideration of his participation in those activities would certainly be illegal. But the affidavits of the Chief Secretary and the Deputy Secretary have, obviously, to be read as a whole In our, view they adequately indicate that the subjective satisfaction related to each case, though the consideration might have originated from the knowledge of the activities of a group We may point out that out of several thousands of the members of the Party, only a few have been detained and certain Left-wing Communists, at least, have not been detained. We see no reason for an inference that detentions were *en masse* destitute of the element of individual satisfaction

The argument that the detentions were illegal, because of references in the affidavits to the security of the State, as distinguished from the defence of India does not appear to be sound The decision in *Ram Manohar Lohia's case*[3], has no application to the present context Here, the detention orders are couched in proper language, and it is only in isolated passages of the affidavits that there is some intermingling of purposes The two counter-affidavits have to be read as a whole, though there might be a passage here and there, in which stress is laid on the security of the State ; thus read, it is clear enough that activities prejudicial to the defence of India, or likely to be so prejudicial, formed the basis of the general consideration These categories are, after all, not rigidly exclusive of each other, as a bare scrutiny of section 3 (1) of the Act or Rule 30 (1) of the Rules well indicate The learned Public Prosecutor has stressed that Police reports were not the only source of information to the Government, and, apart from this, *Emperor* v *Sibnath Banerji*[4], may not apply to the present facts, since the reports were fully considered

Sri M R Venkataraman argued that the detention orders, in several cases, including his case, specified other places of detention, such as Vellore Jail, but actually these persons were detained in the Cuddalore jail contrary to the terms of the original orders. The matter has been explained in the counter-affidavit of Deputy Secretary (Sri Belliappa). As apparently happened in the Supreme Court case, there was a subsequent order of Government, modifying the places of detention, with an attached Schedule, and we have also been shown such an order The argument that orders of detention cannot be served on persons who were already in jail, and that such orders would be illegal, is an interesting one It proceeds, obviously, on the principle that at least at the moment of service of such an order, that person is incapable of indulging in prejudicial activities , nor could there be any apprehension about this But the earlier decisions of the Supreme Court on this aspect, *Rameshwar* v *District Magistrate*[5], and *Makhan Singh* v. *State of Punjab*[6] have been explained in the latter decision *Godavari* v *State of Maharashtra*[7]. In the

1. (1941) 1 K B 72
2 (1941) 2 All E R 665
3 A I R 1966 S C 740
4 L R 72 I A 241 : (1945) 2 M.L J. 325 1945 F.L J 222.
5 A I R 1964 S C 334
6 A I R 1964 S C 1120
7 (1965) 2 S C J 523 1965 M L.J. (Crl) 765

present instances, the detenus who have been apprehended earlier, had either been apprehended under section 151 or section 54 of the Code of Criminal Procedure, and were not in indefinite custody or custody of specific and long duration These services would, therefore, appear to be legal and free from objection Upon any technical defects that might have applied at the time of the service of the original orders of detention, we think that we must accept the argument of the learned Public Prosecutor that if the detention is legal at the time of the return in the *habeas corpus* application, that point of time alone would be material, and a prior illegal order would not truly affect the situation The authorities in support are *Basantha Chandra* v *Emperor*[1], *Ram Narayan Singh* v. *State of Delhi*[2], and *Narain Singh* v *State of Punjab*[3]

We may now pass on to the last general argument, before considering the facts of the individual cases, namely, the manner in which the power of review has been exercised, in the petitions before us In all these causes, where the continuance in detention has been ordered and the review has been declined, the orders have been on printed forms Further, there is nothing to show that an opportunity was given to the concerned detenus to make any representations, or that such representations were heard Sri Rao argues that this is not merely in contrast to the beneficient provisions of section 3 of Madras Regulation II of 1819, but it indicated that we have regressed in this matter of democratic practice as compared with 1819 It is stressed that the power of review should at least be termed a quasi-judicial power, and that the detenu ought to be informed, at this stage at least, of the broad grounds of his detention, and permitted to make his representations, if continuance of detention is to be decided upon. In the judgment in W.A No 16 of 1965 and W.P No 1298 of 1964, to which one of us was a party, this Court had occasion to consider, at some length, the principles upon which a particular exercise of power could be termed quasi-judicial in character, following the criteria in *Rex* v *Electricity Commissioners*[4], as further elaborated in *Ridge* v *Ball Dwin*[5], and in such decisions of the Supreme Court as *Province of Bombay* v. *Kusaldas S Advani*[6], *Radheshyam* v *State of M P*[7], *Board of High School and Intermediate Education U P Allahabad* v *Ganshyam Das Gupta*[8] and *Shankarlal* v *Shankarlal*[9] As pointed by the learned Public Prosecutor, this power of review in cases of detention, is a new provision in the Defence of India Act, 1962, which is not to be found in the 1939 Act or in the 1962 Ordinance

That an order of review is executive and not quasi-judicial in character, has been recently held by the Supreme Court in *Sadhu Singh* v *Delhi Administration*[10], The scope of the power of review has been indicated by the Supreme Court in *B Dutta* v *Chief Commissioner of Tripura*[11], and *Balmukand* v *District Magistrate*[12]. As indicated in these cases, where the order of detention is being reviewed, the question of the possible or probable further activities of the detentu cannot be relevant for the simple reason that he is in detention, his activities, from the date of his detention, upto the date of the actual review, he having been immobilised, are without significance But, the situation which led to his detention could be assessed, as well as its further potentialities The reviewing authority must also take into consideration the probable future activities of the detenu if his detention were to cease According to the learned Public Prosecutor, the power of review has been exercised in favour of the detenus in certain cases, on representations made by them disassociating themselves with certain programmes, or with the Left-wing Communist Party of India It is in this context we think that we should emphasise that

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1 (1945) 1 M L J. 365. 1945 F C R 81 1945 F L J 40
2 1953 S C J 326.
3 (1952) S C J 111 : (1952) 1 M L J 733
4 (1924) 1 K B 171
5. (1963) 2 W.L R 935 at 947.
6 (1950) 2 M L J 703 : 1950 S C J 451 : 1950 S.C.R. 621.
7 A I R 1959 S C 107.
8. (1963) 2 S C J 509
9 A I R 1965 S C 507
10 1965 S C Notes Vol VII, page 174
11 1965 M.L J (Crl) 321 (1965) 1 S C J. 678
12. (1965) 2 S C J 122 1965 M L J (Crl.) 442

the power ought not to be mechanical, or a mere formality. It is a substantial right of the detenu, and it should be real, there should be a careful consideration of all relevant factors, and it would be highly desirable, even if the absence of this procedure does not vitiate the exercise of the power, that the detenu should be afforded an opportunity to make his representations, and that he should be heard. We think that the use or non-use of printed forms is a very minor matter altogether. Clearly, the printed forms could be used after the most mature consideration of every individual case *Per contra* the orders could be in writing, or type-script, relevant *ex facie* to each individual case separately, and could still be a mere mechanical use of the power

Finally, we shall deal though briefly, with the special facts of certain cases which has been placed before us by Sri Rao We may add here that we have taken the trouble to go through the record in each of these cases, which fall into certain clear categories of objection or complaint.

(1) In the following cases W P Nos 1523, 1668, 1684 and 1687 of 1965, the petitioners have been since released and they no longer concern us. The Writ Petitions are dismissed without costs for this reason

(2) There are certain cases of complaint of initial arrest under section 151 or section 54 of the Code of Criminal Procedure, or detention at Cuddalore, without further production before Court or detention at Cuddalore, which is contrary to the place specified in the original order These as already observed are either covered by the recent Supreme Court decision, which makes such service of order of detention illegal, only where the previous custody, is indefinite or for specified prolonged duration, as regards detention in another jail, this is covered by the production of the relevant order of modification by Government.

(3) In W P Nos 1501, 1509, 1513, 1520, 1524, 1689 and 1691 of 1965, the concerned detenus complain that the detention order was served on the detenu by the order being given to him for perusal, and was then taken back, after obtaining a written acknowledgment. No counter-affidavits were filed as this allegation has not been denied in these cases The learned Public Prosecutor concedes that this is most regrettable, and that this occurred only because of the failure on the part of some minor official to apprehend the true import of such imperfect or truncated service. But, subsequently, these persons would appear to have been furnished with the terms of the orders of detention, and they do not advance any grounds of defect or illegality vitiating the order. In the absence of any requirement of law about the service of detention orders, *per se* the procedure adopted would not seem to render the subsequent detention illegal; but, certainly we must deprecate it, and explicitly lay it down that the detention orders should be furnished to detenus, either in original or as a true copy, to enable them to resort to this Court for redress within the limits specified.

(4) The third category of cases comprise W P Nos 791, 873, 1502, 1507, 1662, 1673 and 1675 of 1965, in all of which there are discrepancies in such respects as the name of the father, or the name of the native place of detenu But it is noteworthy that in each of these cases, the counter-affidavits have explained these variations, and the authorities claim to have been satisfied about the identity of the person detained The detenu does not complain of any conceivable error of identification, and it is noteworthy that he is also described as a particular office-bearer or Committee Member of the local Left-wing Communist Party, and he does not repudiate this These matters have been dealt with in greater detail by my learned brother Ramakrishnan, J , and I am in entire agreement with him in that respect.

For these reasons, therefore, we direct that the other writ proceedings be also dismissed; the parties to bear their own costs.

Ramakrishnan, J—I agree. But I would like to add the following particulars, in regard to the third category of cases in which, according to the learned Counsel for the petitioners, there are discrepancies in the particulars of the detenus, supplied

in the detention order. According to the petitioners, these discrepancies would render the detention itself, illegal. I shall consider these cases briefly.

The detenu is described in the detention order as " Sri P Kasinathan, son of Pichai Pillai, Woraiyur, Tiruchirapalli" The petitioner alleged in his affidavit, in addition to the common contentions dealt with earlier in our judgment, that he is really the son of one Palaniandi The State of Madras in the counter-affidavit averred, that the particulars were verified again, and they ascertained that the petitioner's father's name is Pichai alias Palaniandi Pillai, and the Village Munsif of the Village of the petitioner's father, had given such a certificate. This apart, the petitioner is the Secretary of the Tiruchirappalli Town Committee of the Communist Party of India (Left Faction) and this fact is not denied by the petitioner Consequently it was urged that there is no question of any mistake in the identity of the petitioner. These contentions are not denied by the petitioner at the time of the hearing In our opinion the objection raised is groundless and cannot vitiate the detention order.

W P No 873 *of* 1965 —The petitioner here is D. B Govindan. The detention order describes the detenu as " D B Govindan, son of Sri Balakrishnan, Tirupapuliyur, Cuddalore, South Arcot District" Subsequently, on 11th January, 1965 in another Government Order the description of the detenu was corrected to "D. B Govindan, son of Beggari Vathiar" In addition to the common contentions, dealt with earlier in our judgment, the contention of the petitioner, is that he is the son of Bikkari Vadhyar The counter-affidavit of the Government, averred that it was subsequently discovered that the name of the petitioner's father given in the original order was a mistake After enquiry, the correct name was embodied in the amended Government Order There is no material difference between the two words " Beggari " and " Bikkari " which is merely a difference due to euphonics. There is no error in the identity, because the detenu is a member of the District Committee of the Left Faction of the Communist Party of India, and was residing at Tiruppapuliyur in Cuddalore. Since there is no question of any mistake in the identity of the petitioner, the petitioner cannot claim to have suffered any prejudice. We are in agreement with this view and overrule the objection.

W.P. No 1502 *of* 1965.—The name of the detenu in the detention order is given as " Sri V P Chintan, son of Sri V P Kunhikrishnan, Madras". The petitioner alleged, in addition to the common contentions dealt with earlier in our judgment, that his father's name is Kaniankadi Chandu Nair alias K C Nair. In the counter-affidavit, the State Government admitted that the father's name in the detention order is a mistake But the petitioner is a known person, being a member of the Tamilnad Provincial Secretariat of the Communist Party, and therefore there is no mistake in the identity notwithstanding the wrong description of the father's name This contention about his identity has not been denied by the petitioner. We therefore overrule this objection as unsustainable.

W P. No 1507 *of* 1965.—The detenu in this case is described in the Government Order as " Sri S Rami, son of Sonaimuthu, Siruvalai, Madurai Urban". The petitioner in his affidavit alleged, in addition to the common contentions dealt with earlier in due judgment, that his father's name is Samiyanna Nadar and the name of his village is Othakadai. According to him, this difference would heighten the probability that the detaining authority could not have applied his mind seriously before detaining him and therefore his arrest was illegal and was done mechanically. In the counter-affidavit filed on behalf of the Government of Madras, it is urged that the father's name of the petitioner had been subsequently corrected in a revised Government Order issued on 11th January, 1965, and that the orginal description was due to a mistake It was also urged that since the petitioner was a known member of the Madurai District Committee of the Communist Party of India (Left Faction), there was no question of any mistaken identity In view of this clarification in the counter-affidavit, which is not denied by the petitioner, we overrule this objection.

W P No. 1662 *of* 1965 —The name of the petitioner in this case is mentioned in the detention order as " Sri V Jayaraman, son of Sri Veerappa Pillai, Cuddalore, South Arcot district". The petitioner averred, in addition to the common contentions dealt with earlier in our judgment, that his father's name is K Veera Pillai that his place of residence is Nellikuppam, and that this would show that the detention order was passed in his case mechanically while dealing with a large number of persons *en masse* without bestowing any proper attention in his individual case. This allegation is denied in the counter-affidavit on behalf of the Government, which states that by a subsequent verification, it was found out that the petitioner's father's name is Veera Pillai, and that his village is Nellikuppam, but this error would not make any difference according to the counter-affidavit, because there is no doubt about the identity of the petitioner, who is a known member of the Left Communist Party of India, and who is also a member of the South Arcot District Committee of the Communist Party of India This fact has not been controverted by the petitioner. Therefore, we overrule this objection also

W P No 1673 *of* 1965.—The detenu in this case, according to the detention order, is " Sri P N Mani, son of Sri Nagu Pillai, Achampatti, Madurai" The petitioner alleged in his affidavit, in addition to the common contentions dealt with earlier in our judgment, that the name of his village is Achampathu and not Achampatti, as mentioned in the detention order. This appears to be a trifling error arising out of a mis-spelling as pointed out in the counter-affidavit of the State of Madras It is not denied that there is no other mistake in the identity of the petitioner who is admittedly the Secretary of the Achampathu Branch as well as a member of the Madurai District Committee of the Communist Party of India. We, therefore, overrule this objection

W P No 1675 *of* 1965 —The name of the detenu in this case is given in the detention order as " A Abdul Wahab, son of Akkur Meeran Rowther, Kumbum, Madurai North". The petitioner in his affidavit, besides urging the common contentions dealt with earlier, urged that his father's name was Akoor Meera Lebbai Sahib and not Akkur Meeran Rowther. The State Government in their counter-affidavit urged that it is not a significant difference because the principal part of the name of the father of the petitioner is Akkoor Meeran, and that the words " Labbai " or " Levai " " Saheb " or " Rowther " are only added to indicate the caste, etc Therefore, the error, if any, has crept in, only in the description of the the surname to the real name, and is of no significance There is also no difficulty in identifying the petitioner, who admittedly is a member of the Secretariat of the Madurai District Committee of the Communist Party of India. Therefore, we overrule this objection also

W P. No. 1666 *of* 1965 —In this case, besides the common contentions dealt with earlier in this judgment, the petitioner says that his father's name is Antony Cruze, whereas in the detention order it is given as Vel Anthony. No doubt, this allegation about the mistake in the father's name has not been traversed in any counter-affidavit But it is urged by the learned Public Prosecutor that there cannot be any mistake in the identity of the petitioner by his name, as admittedly he is the Assistant Secretary of the Dindigul Town Committee and is a member of the Madurai District Committee of the Communist Party of India, besides holding other well-known positions of Secretary of the Tannery Workers' Union and Dindigul Cigar and Tobacco Workers' Union etc. There is no difficulty about identifying the petitioner in this case We are of opinion that the objection is unsustainable.

W P No 1172 *of* 1965.—The petitioner here is J Hemachandran. Here no counter-affidavit was at all filed by the State Government The petitioner has urged in the affidavit in support of his petition only general grounds which have already been covered in the earlier part of this judgment. Therefore, we uphold the order of detention in this case too

W P Nos 1659, 1678 *and* 1683 *of* 1965.—It is alleged that when serving the detention orders, the Police had with them only blank forms in which the names of the detenus were filled up at the time of actual service This specific plea was urged in addition to the general contentions dealt with in the earlier part of this

judgment. In the counter-affidavits filed by the State this specific contention mentioned above was denied. We are of opinion that the objection has no substance and we overrule it.

R.M. — *Petitions dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice*, MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE M. NATESAN.

Messrs. Raval & Co. and another .. *Petitioners**

v.

K. G. Ramachandran (minor) and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *as amended by Madras Act (XI of* 1964)—*Legislative competence, scope, intendment and applicability—If interferes with contractual tenancies governed by Transfer of Property Act—If applies to contractual tenancies during their subsistence—Application under the Act for fixation of fair rent or for eviction during subsistence of a contractual tenancy between the parties—Maintainability—Validity of Madras Acts XVIII of* 1960 *and XI of* 1964—*If liable to be struck down as offending Article* 14 *or* 19 (1) (*f*) *of the Constitution of India* (1950).

Constitution of India (1950), *Articles* 358 *and* 226—*Proclamation of emergency under Article* 358—*Applicability of Article* 19 *to Acts enacted before and during the emergency respectively—Proceedings under Article* 226—*No trial on issues of fact.*

Entry 18 of List II (State List) of the Seventh Schedule of the Constitution of India includes the relationship of landlord and tenant and rights in or over land and hence the Madras Legislature had the competence to enact the provisions of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) which do interfere with the contractual tenancies under the Transfer of Property Act, both relating to such matters as the fixation of fair rent during such tenancies, and such matters as protection against the eviction of a tenant whether during a contractual tenancy or after its determination and the Act having received the assent of the President under Article 254 (1) of the Constitution of India, will prevail over the Transfer of Property Act to the degree of any inconsistency between the two laws in Madras State.

The Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) plainly purports to deal with all tenancies in respect of residential and non-residential buildings, which had been let out, both contractual and statutory. The argument that the Act does not deal with or interfere with contractual tenancies at all during their subsistence and that it applies only to statutory tenancies after the contractual tenancy has been terminated by a notice under section 106 read with section 111 (*h*) of the Transfer of Property Act, is unsustainable. Such a view is opposed (i) to the Preamble and the intendment expressed in the enactment, (ii) to the definitions of 'landlord' and 'tenant' in the Act, (iii) to the self-sufficient code enacted in section 10 including a special machinery for eviction, (iv) to the provisions of section 7 which enacts specific inroads upon the rental agreements of contractual tenancies and (v) to the provisions of section 4 as to the fixation of fair rent, as available to all landlords and all tenants as defined in the Act. Thus, the Madras Act (XVIII of 1960) has to be interpreted as a special Act which does abrogate the Transfer of Property Act with reference to several of its provisions ; of course its goes further and applies, in its terms, not merely to contractual tenancies during their subsistence, but also to statutory tenancies after the determination of the contractual tenancy. Under the terms of this Act therefore a landlord can evict a tenant on the special grounds available, notwithstanding the subsistence of a contractual tenancy and even though it has not been determined by a statutory notice under section 106 of the Transfer of Property Act. But equally, the tenant has the protection of the Act, even after the termination of the contractual tenancy, so long as he does not do anything which removes the bar of eviction and provides no ground for eviction in terms of the Act. Similarly both during the subsistence of the contractual tenancy and thereafter the parties have the right to get the fair rent determined under the Act.

This seems to be the only interpretation which does justice to the specific provisions of this statute, the legislative competence for such an enactment not being in question. If that is the intendment to be gathered from the plain language of the Preamble and the structure of the provisions of the enactment this inference cannot be shirked merely because there is the absence of a *non obstante* clause. It was no doubt easy for the Legislature to have enacted words, such as "notwithstanding anything in the Transfer of Property Act or any other law to the contrary". But in its wisdom the Legislature might have well intended that the provisions sufficiently and amply do indicate, by their very force, the degree of interference with contractual tenancies sought to be enforced.

The amending Act, Madras Act XI of 1964, including section 3 thereof, cannot be struck down as *ultra vires* under Article 14 of the Constitution of India on the ground of hostile discrimination. The

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*W.P. No. 1124 of 1963, C.R.P. No. 1816 of 1963 and Appln. No. 2443 of 1964 in C.S. No. 163 of 1962. — 20th January, 1966.

classification of 'residential' and 'non-residential' tenancies has been adopted in many tenancy enactments and is a well-recognised and rational principle of differentiation If this is so, hostile discrimination can be conceivably urged only if persons of this class (landlords of non-residential tenements) have been differentially treated There is no basis for the plea of hostile discrimination or the denial of equal protection of the law either with regard to the Amending Act XI of 1964, or with regard to the earlier Rent Control enactments of the Madras Legislature, including Act XVIII of 1960 These successive enactments have embodied a perfectly rational principle of classification and the criteria and their application have been evolved, from time to time, in accordance with the needs of this class of citizens There is also a clear and discernible nexus between the object of the measure and the differentia themselves.

The Legislature is presumed to have knowledge of the facts and conditions which render a particular piece of legislation expedient and beneficial and the good faith of a Legislature must also be presumed The motives of a legislative body or that of the Minister who sponsored the enactment cannot be canvassed and do not affect the validity of the legislation

It is difficult to see how it could be alleged that the legislative history of Madras Act XI of 1964 affords any basis for the plea of hostile discrimination or inequality of treatment

Nor can the Madras Act XI of 1964 be struck down as violating Article 19 (1) (*f*) of the Constitution of India It was admittedly enacted during the pendency of the proclamation of emergency promulgated in 1962 by the President of India under Article 358 of the Constitution of India which had the effect of removing the fetters created on the Legislature by Article 19 of the Constitution of India

However as the infraction of Article 358 on Article 19 is only in respect of a law enacted during the emergency, the validity of an earlier law could certainly be challenged on the ground that it violates Article 19 Thus the provisions of the Madras Act XVIII of 1960 could be challenged on the ground that they violate Article 19 But as a matter of fact Madras Act XVIII of 1960 could not be struck down on the ground that there has been unreasonable restriction of fundamental rights guaranteed under Article 19 (1) (*f*) of the Constitution Assuming that the interest possessed by a tenant in a leas is 'property' for the purpose of Article 19, equally with the interest of the landlords, it cannot be said that Madras Act XVIII of 1960 by making serious inroads on the contractual rights of landlords and tenants has violated Article 19 (1) (*f*)

On issues of fact concerning which there is controversy between the parties the High Court will not embark on a trial under Article 226 of the Constitution of India

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition directing the respondent from prosecuting or proceeding with House Rent Control Petition No. 2942 of 1963 pending on the file of the Chief Rent Controller, Madras, the fourth respondent herein, etc.

V. K. Thiruvenkatachari, for *K C Jacob*, *S. K L. Ratan* and *R. Srinivasan* for Petitioner.

V. Thyagarajan, for Respondents Nos. 1 to 3.

The Advocate-General (*N. Krishnaswami Reddi*) for the Additional Government Pleader, for Respondents Nos. 4 and 5.

Writ Petition No. 1124 of 1963 was first heard by *K. Srinivasan, J.*, who made the following

ORDER OF REFERENCE*.—The petitioners, Messrs Raval & Co., are the tenants of certain premises under a lease which was granted to them on the 20th of December, 1935. The lease was for a period ending with 1st May, 1969. The lessee was entitled to renewal on the same terms and conditions for another period of of fifteen years. The stipulated rent was Rs. 225. The other terms of the lease are not important at this stage. As permitted by the terms of the lease, the petitioners have made alterations, improvements and additions to the property. In 1946, on the demand of the then owner for an increase in rent, a settlement was reached without prejudice to the rights of the petitioners that the petitioners should pay certain extra amounts by way of contribution towards repairs, tax, extra municipal tax, and a 25 per cent. increase in rent as well. The present respondents purchased the property recently and they filed a petition under the Madras Buildings (Lease and Rent Control) Act for fixation of the fair rent The contention raised by the peti-

*3rd December, 1964.

tioners is that during the subsistence of the contractual arrangement, the provisions of the Rent Control Act cannot apply. It is claimed that the Rent Controller has accordingly no jurisdiction to deal with the matter and the prayer of the petitioners is that a writ of prohibition may issue.

It may be mentioned at this stage that under section 30 of Act XVIII of 1960 the Act was made inapplicable to non-residential buildings the rent of which exceeded Rs. 400 per mensem. This section was amended by Madras Act II of 1962, but by Act XI of 1964, non-residential buildings as a class were removed from the scope of the exemption.

In the counter-affidavit filed by the respondents, it is stated that the respondents purchased the property in 1962. It is alleged also that the rent of the premises was only Rs. 225 and even adding the extra amounts paid by the petitioners from 1946 onwards, the rent paid does not exceed the limit of Rs. 400 referred to in section 30. It is accordingly the contention that section 30 has no application and does not take the case outside the scope of the Act. It is also urged that the petitioners cannot rely upon the lease of the year 1935, though why they are disentitled to do so is not explained. It is lastly contended that the statutory tribunals under the Act can investigate the question which has been raised and it is therefore not proper to invoke the extraordinary jurisdiction of this Court in this case.

A supplemental affidavit has been filed by the petitioner attacking the *vires* of Act XI of 1964. It was alleged that besides being *mala fide*, it operates as a hostile discrimination against the landlords of commercial enterprises.

A decision of the Supreme Court in *Dr. K. A Dhairyam* v. *J. R. Thakur*[1] has been cited in support of the contention that the Act will not apply so long as the contractual tenancy is in force. In that case, a lease arrangement was entered into in 1927 for a period of 21 years, the rent reserved being Rs. 50 per month. The lessee was permitted to construct a double-storeyed building, and on the termination of the lease, the lessee was to surrender the premises including the buildings and fixtures to the lessors without any compensation. A short while before the lease was due to expire in 1948, the lessors demanded the surrender of the premises and the buildings with effect from the date of expiry of the lease. The question arose whether the tenants were entitled to the benefits of the provisions of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947. According to this decision, so it is argued by the learned Counsel, the statutory rights conferred by the Tenancy Act cannot commence unless the contractual tenancy is validly put an end to In that particular case, their Lordships considered that the relief prayed for by the lessors was confined only to the building constructed upon the land, and that there could be no question that so far as the land demised by the lease was concerned, the tenants could not be evicted so long as they comply with the provisions of the Act. They examined the terms of the lease and came to the conclusion that the ownership in the building was only with the lessees and that the lessors had no right therein so long as the lease subsisted. They also observed that the provisions of the Control Act did not purport to provide for the continuation of the lease beyond the period specified and that what the Act did was to give the person who continues to remain in possession of the premises although the period of the lease has come to an end, the status of a statutory tenant. From these observations the learned Counsel argues that statutory tenancy cannot come into existence so long as the contractual tenancy subsists. In another decision of the Supreme Court *Punjalal* v. *Bhagwat Prasad*[2], the question arose whether the landlord was entitled to recover possession of the premises by evicting the tenant who was in arrears by resorting to section 12 of the Bombay Rents Hotel and Lodging House Rates Control Act. The first question set down for determination by their Lordships was :

> "Whether it is a condition precedent for the institution of a suit by a landlord for the recovery of possession from a tenant, who has been in arrears of rent, that there had been first a determination of the contractual tenancy ?"

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1. A.I.R. 1958 S C 789.
2. A I.R. 1963 S C. 120.

They observe (at page 123) :

> " When a tenancy is created under a contract between the landlord and the tenant, that contract must hold good and continue to be in force, till, according to the law or according to the terms of the contract, it comes to an end Section 111 of the Transfer of Property Act states the various circumstances in which the lease of immovable property determines. . There is nothing in the Act which would give a right to the landlord to determine the tenancy and thereby get the right to evict the tenant and recover possession This Act was enacted for the purpose of controlling the rent and repairs of certain premises and of eviction due to the tendency of landlords to take advantage of the extreme scarcity of premises compared to the demand for them. The Act intended therefore to restrict the rights which the landlords possessed either for charging excessive rents or for evicting tenants. A tenant stood in no need of protection against eviction by the landlord so long as he had the necessary protection under the terms of the contract between him and the landlord He could not be evicted till his tenancy was determined according to law and therefore there was no necessity for providing any further protection in the Act against his eviction so long as his tenancy continued to exist under the contract.
>
> Sub-section (1) of section 12 of the Act provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy in so far as they are consistent with the provisions of the Act It creates a restriction on the landlord's right to the recovery of possession When the landlord will have such a right is not provided by it. Ordinarily, the landlord will have a right to recover possession from the tenant when the tenancy had determined. The provisions of this section will operate against the landlord after the determination of the tenancy by any of the modes referred to in section 111 of the Transfer of Property Act. What this section of the Act provides is that, even after the determination of the tenancy, a landlord will not be entitled to recover possession, though a right to recover possession gets vested in him so long as the tenant complies with what he is required to do by this section which will be useful to the tenant after his tenancy has determined The section does not create a new right in the landlord to evict the tenant when the tenant does not pay his rent. It does not say so, and therefore, it is clear that a landlord's right to evict the tenant for default in payment of rent will arise only after the tenancy is determined and the continued possession of the tenant is not on account of the contractual term, but on account of the statutory right conferred on him to continue in possession so long as he complies with what sub-section (1) requires of him The landlord is restricted from evicting the tenant till the tenant does not do what he is required to do for peaceful possession under sub-section (1) of section 12. We are therefore of opinion that where a tenant is in possession under a lease from the landlord, he is not to be evicted for a cause which would give rise to a suit for recovery of possession under section 12, if his tenancy has not been determined already It follows that whenever a tenant acts in a way which would remove the bar on the landlord's right to evict him, it is necessary for the landlord to serve him with a notice determining his tenancy and also serve him with a notice under sub-section (2) of section 12 of the Act."

In this decision reference has been made to the decision cited earlier and their Lordships explained the relevant passage in that decision as meaning that the provisions of the Control Act did not affect the terms of the lease according to which the lease came to an end after the expiry of the period for which it was given.

It would certainly appear on a study of these passages that unless and until the landlord validly puts an end to the contractual tenancy, no question of enforcing any rights under the Control Act can possibly arise

There are however one or two decisions of this Court which have taken a different view. It must however be mentioned that these decisions were rendered long before the above decisions of the Supreme Court. In *Venkataraman* v. *Lalluram*[1], the Madras Buildings (Lease and Rent Control) Act XV of 1946 was considered and the question was whether a tenant who entered into occupation of the premises on a contract was not entitled to be evicted when he committed default in the payment of the rent. The statutory appellate authority dismissed the application for eviction on the ground that as the period of the lease had not expired, the terms of the relevant section 7 (2) of the Madras Act would not apply. This Court held that even during the continuance of the contractual tenancy, the tenant could be evicted in accordance with the provisions of the Control Act and that it was not necessary to terminate the tenancy in accordance with the provisions of the Transfer of Property Act before an application for eviction could be maintained. It will be noticed that the view runs counter to what has been decided by the Supreme Court. In another decision *George Oaks Limited* v. *The Chief Judge, Small Causes Court*[2], a petition was filed by the landlord for fixing the fair rent of the premises under section 4 of the Act. Such an application was made during the currency of the term of a registered lease

1. (1950) 2 M.L.J. 489. 2 (1950) 2 M.L.J. 317.

and the contention was advanced on behalf of the tenant that the Rent Controller had no power during the subsistence of a contract of lease to increase the contract rate and to fix the fair rent. This contention was negatived. Viswanatha Sastri, J. observed (at page 322) :

"There is nothing in section 4 to confine its application to statutory tenancies or to exclude its application to contractual rents payable under subsisting leases. . . . . ."

Referring to these decisions, Mr. V. K Thiruvenkatachari urges that the provisions of the Act do not purport to supersede contracts, for, if they purport to do so, the Act would have made it clear by suitable phraseology. There are numerous enactments where rights created by contract, are displaced by employing language such as 'notwithstanding anything in a contract or agreement' or such like words. The Act does not expressly purport to destroy subsisting contracts or even to prohibit landlords and tenants from entering into contracts. *Brij Raj Krishna* v. *Shaw and Brothers*[1], is an instant in point. There their Lordships clearly point out that the Act in question Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, did purport to supersede a contract otherwise validly entered into between the parties and that any attempt to import the provisions of the Law of Transfer of Property Act would be out of place.

After giving the matter careful consideration, I am inclined to the view that the decisions of this Court in so far as they run counter to the observations contained in the decisions of the Supreme Court require reconsideration. Referring to the facts of this particular case, it is not denied that a contract was validly entered into between the parties and subsists even today. Nor is it the contention of the respondents that anyting has been done by the tenants which gives them the right to terminate the tenancy by resort to section 111 of the Transfer of Property Act. If a tenancy has been validly terminated and the tenant thereafter continues to be in possession, he will be entitled to such protection as the Control Act purports to give, but so long as the contractual tenancy has not been put an end to, the provisions of the Control Act appear to be inapplicable in the light of the decisions of the Supreme Court cited above

In the view that I have taken, it is unnecessary for me to consider at this stage whether the subsequent enactment of 1964, which further amended section 30 of the Control Act and removed from the exemption all non-residential premises, is *ultra vires* or is tainted by the charge of discrimination.

In my view, the question is one of sufficient importance to be considered in all its aspects by a Full Bench The papers will accordingly be placed before the Honourable the Chief Justice

In pursuance of the above Order of Reference the Petitions were heard by a Full Bench (*M. Anantanaryanan, O C.J*, *K. Srinivasan*, and *M. Natesan, JJ.*).

V. K. Thiruvenkatachari for *K. C Jacob, S. K L Ratan* and *R. Srinivasan*, for Petitioner.

V. Thyagarajan, for Respondents Nos 1 to 3

The Advocate-General (*N Krishnaswami Reddi*) and the Additional Government Pleader, for Respondents Nos. 4 and 5 (in W P. No 1124 of 1963).

K Rajah Iyer for *M A Ghatala, V. Narayanaswamy* and *K. R Ramabhadran*, for Petitioner.

D Ramaswamy Iyengar, for *S Kuppuswamy* and *A V. Murali*, for Respondent.

The Advocate-General, for State.

V K Thiruvenkatachari for *T T Srinivasan* and *A N. Rangaswamy*, for Respondent (in C R P No 1816 of 1963).

The Judgment of the Full Bench was delivered by

Anantanarayanan, O C J †—W P No. 1124 of 1963 comes before us on a Reference made by one of us (K. Srinivasan, J) It was a proceeding in Prohibition, by

1. (1951) S C J 238.

†20th January, 1966.

Messrs. Raval & Company (petitioners), seeking to restrain the respondents, including the Chief Rent Controller, Madras (fourth respondent), from prosecuting or proceeding with a petition for the fixation of fair rent, under the Madras Rent Control Acts. Connected with this are two other proceedings, namely, C.R P. No. 1816 of 1963 and Application No 2443 of 1964 in C S No 163 of 1962, in which certain closely inter-linked questions are involved Our learned brother (Srinivasan, J) felt the difficulty that the catena of decisions of this Court, as far as the Madras Rent Control Acts are concerned, had been only in the consistent directions that these Acts did purport to interfere with contractual tenancies, both as regards the fixation of fair rents and as regards the respective rights of landlords and tenants, in the matter of eviction and the grounds for eviction , while certain recent decisions of the Supreme Court, no doubt not upon the Madras Acts but upon similar enactments of other States, appear to justify the interpretation that the contractual tenancies should first be terminated by a notice under section 111 (*h*) of the Transfer of Property Act, after which alone the procedure under the special Acts would become applicable, their object being to give this additional protection to what are termed ' statutory tenancies '.

This explains the Reference, and, as the matter has been argued before us, the following questions emerge for our consideration .—

1 Do the Madras Act, including the latest Amending Act XI of 1964, enact as self-contained Code governing all relationships between landlords and tenants, during their subsistence, including contractual as well as statutory tenancies, within their ambit ?

2. In particular, do they enable landlords and tenants to obtain the determination of fair rents for buildings, even during contractual tenancies, and notwithstanding the contract of rent, to which the tenancies relate ?

Similarly, do they enable the landlords and tenants to work out their respective rights in the matter of the liability of the tenants for eviction on the grounds specified in the Acts, even during a contractual tenancy, and without that tenancy being first determined by the landlord in accordance with section 111 (*h*) of the Transfer of Property Act ?

4 Can this interpretation be sustained, as a matter of legislative competence and legislative intendment, notwithstanding the absence of a *non-obstante* clause in the Acts ?

Apart from these questions, which are on the interpretation of the particular statute, two questions of their constitutional validity have also been raised before us. The first is that Amending Act XI of 1964, under which a ceiling in respect of non-residential tenements, namely, Rs 400 specified in section 30 of Madras Act XVIII of 1960, was done away with, and a further section in the Amending Act (section 3) was introduced for the abatement of certain pending proceedings, is *ultra vires*, as offending Article 14 of the Constitution ; the argument is that, both as a matter of legislative history and in the substantial sense, the amending enactment embodies a hostile discrimination against the landlords of non-residential premises, without a reasonable basis or objective On this aspect, even the *bona fides* of the amending enactment has been assailed, and it is contended that the enactment was hastily rushed through the Legislature, without the salutory procedure of a reference to a Select Committee, and in a matter of one or two days, because the concerned Minister had a personal motive to obtain the benefit of the legislation An interpretation of section 3 of Madras Act II of 1964 also arises, particularly in connection with the facts in Application No. 2443 of 1964 in C. S. No. 163 of 1962. The other constitutional point raised during the arguments relates to an alleged infringement of the protection afforded by Article 19 in more than one respect The learned Advocate General relied upon Article 358 of the Constitution for the view that the provisions of Article 19 are themselves suspended during the operation of the present Proclamation of Emergency ; the tenability of this view, in the context of the interpretation

of Article 358 in relation to enactments prior to the Emergency such as Madras Act XVIII of 1960, is also a matter on which arguments have been addressed

I might immediately state that we have been concerned, during the arguments submitted to the Full Bench by learned Counsel on both sides, with several enactments of various States, which do have a marked similarity, in respect of their broad objectives and the statutory structure, but which equally exhibit vital differences in several respects This is of great importance, because we have to consider the ratio of certain decisions of the Supreme Court in the context of the catena of decisions of this Court about successive Madras Acts which decisions of the Supreme Court were rendered with reference to other special Acts, and not the Madras Acts For instance, we have been occupied with the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (LVII of 1947), the Bihar Buildings (Lease, Rent and Eviction) Control Act (III of 1947), the Madhya Pradesh Act, the Delhi and Ajmer-Merwara Rent Control Act, the Orissa Act, the Rajasthan Act, the West Bengal and Mysore Acts, in addition to our own Actually, a detailed scrutiny appears to show that these Acts cannot merely be lumped together into one category of Urban Legislation for the control of letting and the regulation of rents of buildings, and that such a generalisation might be very misleading, since significant differences are thereby obliterated On the contrary, I think that a threefold classification would be probably more valuable. At one extreme we have Acts like the Rajasthan Act, which has been judicially interpreted by that Court with reference to Article 254 (1) and (2) of the Constitution, as being merely supplementary to the Transfer of Property Act, and as not containing anything repugnant to the pre-existing law concerning landlords and tenants of buildings ; certain further features are merely superimposed, so that there was no need to obtain the assent of the President under Article 254 (2), for the validity of the enactment In the middle group would appear to fall the larger number of the Acts, particularly an Act like Bombay Act LVII of 1947 Here, no doubt, an additional protection is given to statutory tenancies, in several ways, but the ordinary machinery of the civil Courts is not disturbed. That machinery, and the background of the provisions of the Transfer of Property Act remain, governing this class of relationships. At the other end, we have an Act like the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), which, in section 10, practically enacts a self-contained code, with a special machinery of Rent Control Tribunals for applications for eviction, and orders for eviction. Actually, under section 18, the execution of the orders of these Tribunals, like decrees of civil Courts, is provided for, and section 23 provides a special machinery for appeal, while section 25 vests powers of revision in this Court and in the District Courts. On this ground alone, I think that great care has to be exercised before the dicta and conclusions of the highest Court of the land, interpreting the statute of some other State, are applied to the Madras Acts, without due regard to the distinct groups, into which these seemingly allied enactments appear to fall and to vital differences, both of statutory structure and perhaps even of legislative intendment. For this reason, I shall first deal with the Madras Acts, and the catena of decisions of this Court, available on the Madras Acts, before proceeding to other Acts and the decisions of the Supreme Court. As a prelude to the analysis of the provisions themselves, we may first take up the matter of legislative competence, of legislative intendment, and the absence of a *non obstante* clause in the Madras Acts, with regard to its consequences.

As far as legislative competence is concerned, there is really no room for doubt. Entry 18 of List II (State List) of the Seventh Schedule, includes the relationship of landlord and tenant and rights in or over land, and under Article 254 (1) and (2), it is not disputed that the Madras Acts, having received the assent of the President, will prevail over the Transfer of Property Act, to the degree of any inconsistency between the two laws, in Madras State. Legislative competence thus being conceded, legislative intendment has to be gathered from the Preamble, and the structure of the enactment. We may here point out that the Madras Buildings (Lease and Rent Control) Act (XV of 1946) was succeeded by the Madras Buildings (Lease and Rent Control) Act (XXV of 1949), which, in its turn, was succeeded by the similar Act

(XVIII of 1960), which is in force, as amended by Madras Act XI of 1964 Sri Thiruvenkatachari, for Messrs. Raval & Company, has emphasised that these are *ad hoc* pieces of legislation, enacted for a temporary duration, which has been extended from time to time. Nevertheless, the intendment of the Legislature cannot be inferred with reference to such a characteristic alone , nor can the principle of interpretation of statutes, that I shall refer to in another context, that the Legislature does not ordinarily intend any revolutionary modification in the pre-existing corpus of law, such as the law of landlord and tenant in respect of buildings, necessarily lead to the inference that these Acts were merely superimposed safeguards to operate with regard exclusively to statutory tenancies On the contrary, confining ourselves to Madras Act XVIII of 1960, for the moment, the purpose of this Act is " to amend and consolidate the law relating to the regulation of the letting of residential and non-residential buildings, and the control of rents of such buildings, and the prevention of unreasonable eviction of tenants " In other words, in the context of spiralling inflation in respect of urban rents for buildings, conditions of scarce accommodation, and perhaps considerable hardship to tenants occasioned by evictions strictly under the law, the Legislature seems to have intended to regulate these matters by statute, for the benefit of citizens But before proceeding further into the other sections of the Act, which are clearly indicative of the degree of its encroachments on pre-existing law, I might usefully turn to two aspects (i) the consequence of the absence of a *non-obstante* clause in the legislation, and (ii) the view that has been uniformly taken of the Madras Acts by decisions of this Court.

As regards the first point, it was dealt with by Govindarajachari, J , in *Moses Pillai* v *Govindan* [1], where the matter was apparently put in the same form The learned Judge observed at page 52

"Mr J S Vedamanickam, Counsel for the appellant, attempted to distinguish this case (*Goldsmith* v *Orr* [2] on the ground that the English statute (Increase of Rent and Mortgage Interest (Restrictions) Act, 1919) contains the words 'Notwithstanding any agreement to the contrary', and that there are no similar words in clause 7 (*a*) of the Madras House Rent Control Order of 1941 This arguement I am unable to accept Even without the use of those words, the Legislature can indicate that its provisions shall apply, notwithstanding that the parties contracted otherwise. . . . . "

In *Aswani Kumar* v. *Arabinda Bose* [3], the principle has been expressed in the following form :

" . . for, even apart from such clause (*non-obstante* clause), a later law abrogates earlier laws clearly inconsistent with it "

The Legislature had the competence to enact the provisions of a special statute, which do interfere with the contractual tenancies under the Transfer of Property Act, both relating to such matters as the fixation of fair rent during such tenancies, and such matters as protection against the eviction of a tenant whether during a contractual tenancy, or after its determination , so much is not in dispute Such a special Act, having received the assent of the President, will prevail over the Transfer of Property Act in the concerned area If that is the intendment to be gathered from the plain language of the Preamble and the structure of the provisions, we cannot shirk this inference, merely because there is the absence of a *non-obstante* clause. It was, no doubt, easy for the Legislature to have enacted words, such as " Notwithstanding anything in the Transfer of Property Act, or any other law to the contrary ", but in its wisdom, the Legislature might have well intended that the provisions sufficiently and amply do indicate, by their very force, the degree of interference with contractual tenancies sought to be enforced We shall immediately turn to the available Madras cases upon the successive Madras Acts As we shall show, they have been consistently in one direction, and that is that the Madras Acts do invade the domain of the pre-existing law of landlords and tenants, in respect of the letting and rents of buildings, and the evictions of tenants.

In *Moses Pillai* v *Govindan* [1], already referred to, Govindarajachari, J , was concerned with an agreement in terms of which the tenant undertook to pay rent at the rate of Rs 45 per month, failing to deliver possession of the house within a stipulated

1. (1948) 1 M.L J 51.
2. 89 L J.K. B D 901.
3. (1952) S C J, 568 · A I.R 1952 S.C. 369 (377).

period In the suit by the landlord to recover the higher rate of rent, the tenant relied on clause 7 (*a*) of the Madras House Rent Control Order, 1941, to contest the claim The learned Judge held that the clause applied, even though the parties had contracted otherwise The language of clause 7 (*a*) was peremptory, and had barred the increase in rent claimed In *Parthasarathy* v. *Krishnamoorthy*[1], Subba Rao, J , (as he then was) appears to have felt the force of the opposite view, which has been pressed before us by Sri Tiruvenkatachari. It was held that the object of Madras Act XV of 1946 was to prevent unreasonable eviction, and not to confer any new rights of eviction on the landlord By enacting section 7 of the Act, the Legislature did not, expressly or by implication, repeal the provisions of the Transfer of Property Act Hence, unless and until a tenancy was determined under section 111 (*h*) of the Transfer of Property Act, a landlord could not obtain an order for eviction or possession The learned Judge cited from Maxwell on the Intepretation of Statutes, 8th Edition, page 73, the passage expressing the principle to which I have made earlier reference, that the Legislature " does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the statute " The learned Judge pointed out that the Legislature could have enacted a *non-obstante* clause with regard to the Transfer of Property Act, ' in plain terms '. But in *Krishnamurthy* v. *Parthasarathy*[2], this decision was reversed, and the Division Bench held that a notice to quit under section 111(*h*) of the Transfer of Property Act was not necessary before filing an application under section 7 of Madras Act XV of 1946. In *Merchant* v. *The Bank of Mysore Ltd* [3], Satyanarayana Rao, J , followed this decision, and held that the Rent Controller had jurisdiction to order eviction, even in cases where the contractual tenancy had not been determined under section 111 of the Transfer of Property Act, as section 7 of the Rent Control Act applied both to constractual and statutory tenancies

In *Rangaswami Naidu* v. *Bangaru Chetty*[4], a Division Bench of Rajamannar, C.J., and Satyanarayana Rao, J , pointed out, in the context of the facts of that case, that in construing Madras Act XV of 1946, it was not permissible to import conceptions which relate to the ordinary law of landlord and tenant, either under the Transfer of Property Act, or as obtaining in England *Raja Chetty* v *Jagannathadas Govindas*[5] is interesting for the reason that it included certain dicta which appear to have subsequently given rise to some difficulty, though it was sustainable on the main finding that the provisions of Madras Act XV of 1946 would not apply to a lease of furniture, fittings and projector equipment The Bench went further and observed that the parties must have known of the provisions of Madras Act XV of 1946, and, on the facts of the agreement, the landlord must be deemed to have waived the right to evict conferred by the Act In *Kuppuswami* v *Mahadeva*[6], a Division Bench held that section 116 of the Transfer of Property Act had no application to matters arising under the Rent Control Act The decision of the Federal Court in *Kai Khushroo* v. v. *Bai Jerbai*[7], was referred to, and it was stressed that the tenant may, under the special Act, enjoy a statutory immunity from eviction, even after the lease had expired.

In *George Oakes Ltd* v *The Chief Judge, Small Cause Court, Madras*[8], one of the decisions noticed by our learned brother (Srinivasan, J) in the Reference, a Division Bench held that section 4 of Madras Act XV of 1946, which deals with the fixation of fair rent, expressly included the landlord as a person entitled to apply to have the fair rent fixed There was nothing in the section to confine its application to contractual rents payable under the subsisting lease. But the landlord could not claim the difference between the fair rent which had been fixed in excess of the contractual rent, and the contractual rent, anterior to the date of his application The learned Chief Justice (Rajamannar, C J.) expressly referred to his own decision in *Raja Chetty's*

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1 (1948) 2 M L J 391.
2 (1949) 1 M L J 412.
3 (1949) 1 M L J 417.
4. (1948) 2 M.L J. 82.
5. (1949) 2 M L J 694
6. (1950) 1 M L J 72
7. 1949 F C R. 262 : (1942) F L J. 168.
8. (1950) 2 M L J. 317.

case[1], and pointed out that the decision did not imply that a tenant could validly contract himself out of the benefits conferred on him by the Act Certain observations of Viswanatha Sastri, J, in the same judgment, powerfully indicate that the argument of encroachment on the pre-existing law of contractual tenancies, or the need for preserving the sanctity of contracts, were felt by the Bench to be of no avail whatever, in the face of the plain intentions of the Legislature In *Venkataratnam* v. *Lalluram*[2], Rajamannar, C J, and Balakrishna Ayyar, J, again held, that even during the continuance of the contractual tenancy, a tenant may be evicted under section 7 (1) of Madras Act XV of 1946.

In *Venkateswara Rao* v *Mohammad Mohibulla Saheb*[3], Govinda Menon, J, held that the provisions of sections 5 and 6 of the Act were rather peremptory, and will apply even though the parties contract to the contrary *Moses Pillai* v *Govindan*[4], was followed In *Ramalingam* v. *Gurumuthi Reddy*[5], a Division Bench held that the tenant could take advantage of the provisions of the Act, notwithstanding the contractual tenancy for a specified period In *State of Madras* v *Natwaralal Davey*[6], Rajamannar, C J, held with reference to section 3 (5) of the 1949 Act, that even though the landlord might have agreed to a certain rent, he was not prevented from having recourse to an application for the fixation of fair rent, this is in line with the decisions of this Court that the right of both the landlord and the tenant to apply for fixation of fair rent under the said Act, was unaffected by the subsistence of a contractual tenancy, or the super-imposition of a statutory tenancy, after the contractual tenancy had been determined. In conclusion, we might notice two comparatively recent decisions of this Court, namely, *Venkataswami* v *Abdul Rahim and brothers*[7], and *Mohammed Burhanuddin* v *Official Trustee*[8] The former decision squarely held, under Madras Act XXV of 1949, that a tenant could apply for the fixation of fair rent, notwithstanding an agreement to pay rent under a contractual tenancy. Apparently, in the light of case-law that I have set forth, the proposition was almost taken for granted, since the case-law is not discussed Ramakrishnan, J, in the latter decision pointed out that so long as the contractual rent does not exceed the fair rent, determinable by statute, which, under the Act of 1949, was a specified maximum the contract rent could well be enforced But in cases where the contract rent exceeded the maximum, then the principle applied that the tenant cannot contract himself out of the statute

This may be the convenient context for notice of the line of argument, as it was developed by Sri Thiruvenkatachari Learned Counsel contended that the Rent Control Act did not deal with, or interfere with, contractual tenancies at all; they continued to be governed by the Transfer of Property Act The Rent Control Act dealt only with what are termed 'statutory tenancies'; under it, a statutory tenant had merely a right not to be evicted, while conforming to the conditions laid down in the Act There was a corresponding remedy for fair rent, for both the landlord and the statutory tenant; but this, again was inapplicable to contractual tenancies. A statutory tenancy is essentially a continuation of what was originally a contractual tenancy, for that reason, every contractual tenancy must be terminated by a notice under section 111 (*h*) of the Transfer of Property Act, before the Rent Control Act could at all apply While there was contractual tenancy in force, the tenant did not require the protection of the Rent Control Act The Rent Control Acts are *ad hoc* Acts, temporary in their duration. They cannot supersede the law of contract, or affect the sanctity of contracts.

The term 'statutory tenant' is a neologism, which has come into existence because of protective legislation in favour of persons whose contractual tenancies had been determined, and who, nevertheless, continued in occupation without further attornment; as the Supreme Court had occasion to point out, such a person was not really a 'tenant' at all Sri Thiruvenkatachari concedes that this interpreta-

1 (1949) 2 M L J 694
2 (1950) 2 M L J 489.
3. (1953) 1 M L J 490
4. (1948) 1 M L J. 51.
5 (1954) 2 M L J 752
6 (1960) 2 M L J 384.
7. (1962) 1 M L J 408
8. (1961) 2 M L J. 29.

tion might be opposed to the definitions of ' landlord ' and ' tenant ' in the 1960 Act, as indeed it is. We might go further and emphasise that it is against the structure of the enactment itself, in several vital respects. As a matter of interpretation of the statute, based not merely on the Preamble but the entire complex of the provisions, we do not see how it is possible to contend that Madras Act XVIII of 1960 does not make quite substantial inroads into the pre-existing law of ' landlord ' and ' tenant ', as relating to contractual tenancies. An opposite view would render nugatory several significant provisions of the Act, the self-contained machinery of section 10, and thus frustrate the objectives of the Legislature. This can be immediately shown, even apart from the intendment of the Preamble that I have earlier set forth.

Section 2 (6) of the Act defines ' landlord ' and section 2 (8) defines ' tenant '. They are symmetrical and complementary definitions. Sri Thiruvenkatachari concedes that the definition would include both a tenant during the subsistence of contractual tenancy, and tenant ' continuing in possession after the termination of the tenancy '. In other words, this Madras Act plainly purports to deal with all tenancies in respect of residential and non-residential buildings, which had been let out, both contractual and statutory. We may next turn to section 4, which enables any tenant or landlord, to whom the Act applies, to apply for the fixation of fair rent. An elaborate machinery is provided for the determination of fair rent, and the construction that this relates only to tenancies that had been determined under the Transfer of Property Act, will be meaningless. For, if we turn to the significant provisions of section 7, sub-sections (1), (2) and (3), we find them to be explicitly to the following effect :

" (1) Where the Controller has fixed the fair rent of a building—

(a) the landlord shall not claim, receive or stipulate for the payment of (i) any premium or other like sum in addition to such fair rent, or (ii) save as provided in section 5 or section 6, anything in excess of such fair rent :

Provided that the landlord may receive, or stipulate for the payment of, an amount not exceeding one month's rent, by way of advance ;

(b) save as provided in clause (a), any premium or other like sum or any rent paid in addition to or in excess of, such fair rent, whether before or after the date of the commencement of this Act, in consideration of the grant, continuance or renewal of the tenancy of the building after the date of such commencement, shall be refunded by the landlord to the person by whom it was paid or at the option of such person, shall be otherwise adjusted by the landlord :

Provided that where before the fixation of the fair rent, rent has been paid in excess thereof, the refund or adjustment shall be limited to the amount paid in excess for the period commencing on the date of application by the tenant or landlord under sub-section (1) of section 4 and ending with the date of such fixation.

(2) Where the fair rent of a building has not been so fixed—

(a) the landlord shall not claim, receive or stipulate for the payment of, any premium or other like sum in addition to the agreed rent :

Provided that the landlord may receive, or stipulate for the payment of, an amount not exceeding one month's rent, by way of advance.

(b) Save as provided in clause (a), any sum paid in excess of the agreed rent, whether before or after the date of the commencement of this Act, in consideration of the grant, continuance or renewal of the tenancy of the building after the date of such commencement, shall be refunded by the landlord to the person by whom it was paid or, at the option of such person, shall be otherwise adjusted by the landlord.

(3) Any stipulation in contravention of sub-section (1) or sub-section (2) shall be *null* and *void*."

Thus even, where there is a contract of tenancy and the fair rent had not been determined at all, any premium, otherwise than an advance of one month's rental, and any sum in consideration of the grant, continuance or renewal of the tenancy, are refundable ; stipulations to the contrary are void. There cannot be a plainer expression of an intent to make incursions into the pre-existing law of tenancies of buildings under the Transfer of Property Act.

As we pointed out earlier, section 10 is a complete code for the eviction of tenants on certain grounds, with a special machinery provided for the decision. It is important to note that under section 10 (2) (i) one ground of eviction is that " the tenant has not paid or tendered the rent due by him in respect of the building, within fifteen days after the expiry of the time fixed in the agreement of tenancy with his

landlord" Here again, the landlord obtains a right to evict, which is *prima facie*, unrelated to the determination of the tenancy by a notice conforming to section 108 of the Transfer of Property Act Under section 10 (2) (*ii*) (a), the transfer of a lease and sub-letting without the specific written authority of the landlord are grounds for eviction, admittedly, these are variations from the law of contractual tenancies under the Transfer of Property Act, whereunder transfer or sub-letting would be perfectly lawful, unless prohibited Again, section 10 (3) (*d*) is very significant. This enacts that where the tenancy is for a specific period agreed upon, the landlord shall not be entitled in the duration to apply for possession of the building for his own *bona fide* additional accommodation under section 10 (3) (*c*), the enactment here exhibits an awareness of mutual rights and obligations under contractual tenancies, and the need for preserving them against the inroad of a special Act, in certain contingencies There are other special features of the Act, such as a *bona fide* requirement of the building for immediate demolition and reconstruction (section 14 (*b*)) ; the requirement for carrying out repairs, restraint of the landlord from interference with certain amenities, restraints upon conversion of a residential building into a non-residential building (section 21) all of which are, in very plain terms, expressive of the intention to modify the prior law Indeed, if this Act could be held to apply only to statutory tenancies, after the contractual tenancy had first been determined under the Transfer of Property Act, landlords would be helpless to obtain possession of buildings, while tenants may go on 'wilfully defaulting' to pay rents, and the tenants would be equally helpless to obtaining the benefits of a determination of fair rent, where the contract for rent, which may be far in excess of the fair rent might have been arrived at between the parties, owing to economic pressures, and to subsist for considerable periods.

We think that we have shown sufficiently that the interpretation upon the Madras Acts, that Sri Tiruvenkatachari attempts to persuade us to accept, is totally opposed, not merely to the catena of decisions of this Court on the Madras Acts but to the expressed intentions of the Legislature, to the very structure of the enactments, and to the manifest inroads into the pre-existing law, which these enactments have made We may now turn to the decisions of the Supreme Court and other High Courts upon other Acts, in order to see how far those decisions compel any contrary interpretation In that analysis, we also propose to refer, though very briefly, to the very different provisions of certain of those special Acts, which, in our view, are significantly different from the Madras Act, which is a complete code both for determination of fair rent and for eviction of tenants, with a special machinery for both purposes.

In *Brij Raj Krishna* v *Shaw and Bros* [1], their Lordships of the Supreme Court were concerned with the interpretation of the Bihar Buildings (Lease, Rent and Eviction) Control Act (III of 1947), and the bar of jurisdiction of a civil Court, with regard to the finding by the Controller, of alleged non-payment of rent as justifying the eviction of a tenant. Section 11 (1) (*a*) of the Act contained a *non-obstante* clause in clear terms The Supreme Court held that the Controller had jurisdiction to determine whether there was non-payment of rent or not, and that, even if he decided erroneously, his order could not be questioned in a civil Court In *Karani Properties Ltd* v *Miss Augustine*[2], the Supreme Court was concerned with the West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950) and the interpretation of the word 'rent' as occurring in the statute ; the term was held comprehensive enough to include all payments agreed by the tenant to be paid to his landlord, for the use and occupation in respect of both the building and its installations In *Dr K. A Dhairyawan* v *J R Thakur*[3], the Bombay Act LVII of 1947 was the subject of interpretation, with regard to section 13 of that Act, in the context of the right of the lessee embodied in section 108 (*h*) of the Transfer of Property Act. The Court held that, notwithstanding section 108, the lessees could contract to hand over the building to the lessors, without the right to receive compensation at the

1 (1951) S C J 238
2 (1957) S C J 177.
3. (1958) S C J. 1060.

end of the lease; but such a contract did not transfer the ownership in the building to the lessors while the lease subsisted. The provisions of the Bombay Act gave to the person, who continued to remain in possession of the land, although the period of the lease might have come to an end, the status of a statutory tenant. In this context, it is important to stress certain features of Bombay Act LVII of 1947. Section 11 of the Act relates to the fixation of standard rents, by a certain procedure. Section 12 gives a right to the tenant not to be ejected, so long as he pays the standard rent and permitted increases Under section 12 (2), there is a further protection against a suit for possession by the landlord on ground of non-payment of these rents, until the expiration of a month after a notice of demand Section 13 enacts the grounds upon which the landlord is entitled to recover possession of the premises, subject to section 15 which is a bar of the tenant's right to sub-letting or transfer. *H. S. Rikhy* v *New Delhi Municipality*[1], is a decision on the Delhi and Ajmer Rent Control Act (XXXVIII of 1952) The definitions of 'letting', 'landlord', 'premises' and 'tenant' in the Act are referred to and discussed, and the Court held that licensees were not included within the ambit of the Act In *R. M Paranjype* v. *A M. Mali*[2], the Court held that where tenancies were terminated under the Bombay Tenancy and Agricultural Lands Act LXVII of 1948 since the termination was under a statutory provision, the landlords acquired a statutory right to possession, equity did not operate to annul a statute In *Punjalal* v *Bhagwat Prasad*[3], we have the interpretation of section 12 of the Bombay Act LVII of 1947, in relation to section 111 of the Transfer of Property Act. It is here that their Lordships held that sub-section (1) of section 12 of this Act merely provided that the landlord will not be entitled to the recovery of possession of any premises, so long as the tenant was willing to pay the standard rent and permitted increases The provisions will, therefore, operate against the landlord after the determination of the tenancy by any of the modes referred to in section 111 of the Transfer of Property Act. Indisputably, after such a determination, the landlord has a right to recover possession, but he cannot actually obtain possession because of the statutory protection afforded to the tenant, as an additional feature, by the Act It was further observed at page 123.

> "The landlord is restricted from evicting the tenant till the tenant does not do what he is required to do for peaceful possession under sub-section (1) of section 12 We are therefore of opinion that where a tenant is in possession under a lease from the landlord, he is not to be evicted for a cause which would give rise to a suit for recovery of possession under section 12 if his tenancy has not been determined already It follows that whenever a tenant acts in a way which would remove the bar on the landlord's right to evict him, it is necessary for the landlord to serve him with a notice determining its tenancy and also serve him with a notice under sub-section (2) of section 12 of the Act"

It is, to some extent, on these dicta that the contention has been put forward by Sri Tiruvenkatachari and Sri K. Rajah Ayyar in C.R P No 1816 of 1963, that, under the Madras Act also, the contractual tenancy, even if the tenancy is from month to month must first be determined by a notice under section 111 of the Transfer of Property Act, before the liability of the tenant to be evicted would arise. But, as we have earlier hinted, the Bombay Act and the Madras Act are vitally different in their respective structure on this point Actually, the Bombay Act, significantly enough, does not provide that a landlord is entitled to eject a tenant for non-payment of rent, unlike the Madras Act, nor does it provide a special machinery for such eviction The combined effect of sections 11 and 12 of the Bombay Act is that so long as the tenant pays the standard rent and permitted increases, even after the determination of the tenancy, the landlord does not get any right to recovery of possession. Under section 12 (3) (*a*), the landlord can get a decree for eviction in a suit for recovery of possession, only if the tenant does not pay rent for a period of six months, in the case of monthly rentals The grounds for recovery of possession in section 13 are quite distinct Under the Madras Act, such an interpretation cannot prevail, for 'wilful default' in the payment of rent is a ground upon which the landlord can take advantage of the special machinery for eviction. If the contractual tenancy is first to be determined, this will simply imply that, where

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1. (1962) 1 S C J 612.
2. A.I.R. 1962 S.C. 753.
3. (1963) 2 S C J. 441 A.I.R. 1963 S.C. 120

there is a lease for a long period, the Act is powerless to compel the tenants to pay rent on pain of eviction. Here, the Legislature was probably influenced by a balancing of considerations A powerful mantle of protection has been thrown on tenants, contractual or even after the clear determination of their contracts, against eviction by the landlord, however greatly the pre-existing property law might sustain the landlord's claim to possession It stood to reason that the tenants should strictly fulfil their obligations, both during the contractual tenancies and thereafter.

Mangilal v *Sugan Chand*[1] is a decision on the Madhya Pradesh Accommodation Control Act XXIII of 1955 The provisions of section 4 of this Act were held to be in addition to those of the Transfer of Property Act, and the Court held that before a tenant can be evicted by a landlord, he must comply with the provisions of section 106 of the Transfer of Property Act and those of section 4 Notice under section 106 was essential to bring to an end the relationship of landlord and tenant, and unless that relationship was determined, the Act did not come into force, and the landlord did not get a right of eviction The effect of clause (*a*) of section 4 of the Act did not convert a periodic tenancy into one of fixed or indefinite duration, nor insert therein a clause of re-entry on the ground of non-payment of rent The character of the tenancy as one from nonth to month remained A condition was added by this Act that the unfettered right to terminate the tenancy conferred by section 106 will be exercisable only if one of the grounds set out in section 4 of the Madhya Pradesh Act is shown to exist

This perspective of interpretation is not available with regard to Madras Act XVIII of 1960, because of its quite different structure and provisions In the Madras Act, the grounds upon which a landlord was entitled to evict a tenant, in section 10 apply to all landlords and tenants by definition, whether the tenancies be under subsisting contracts, or after determination- These grounds include ' wilful default ' in payment of rent, and there will be great difficulty in sustaining the interpretation that eviction is possible only after the determination of the tenancy under the Transfer of Property Act, namely, section 106 read with section 111. How can there be such a determination, if the contractual tenancy has still a further period to expire, and is not a tenancy from month to month ? Can we read the grounds specified in section 10 as additional grounds for eviction, also available to the landlord as grounds for determination of the tenancy itself under the Transfer of Property Act ? The rational interpretation, which we are constrained to make, in the light of the provisions and their plain purport, as far as the Madras Act is concerned, is, whether the tenancy be contractual or statutory, that these grounds are available to the landlord for eviction, irrespective of the provisions of the Transfer of Property Act. With even greater force, the grounds will be available in favour of the tenants, as protection from eviction, along with the right to have the fair rent determined under the Act

In *Anand Nivas (P), Ltd* v *Anandji*[2], we have the latest decision on Bombay Act LVII of 1947, with reference to the juxtaposition of sections 13, 14 and 15 of several of which I have earlier referred to It is here we find that the Supreme Court commented upon the neologism of ' statutory tenant ' and its implication (at p 422) .

> " Such a person is not a tenant at all , he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and the permitted increases His right to remain in possession after the determination of the contractual tenancy is personal , it is not capable of being transferred or assigned "

On the contrary, section 14 of the Bombay Act, unlike section 12 (1), related to contractual tenancies alone, upon the language used The decision was upon the right of a statutory tenant to sub-let.

On a careful perusal of these decisions of the Supreme Court, including *Punjalal's case*[3], we are unable to discover any ratio in these decisions, which were not rendered

1 A I R. 1965 S C 101
2. A.I R. 1965 S C 414.
3 (1963) 2 S.C J 441.

with reference to the intendment, or structure of the Madras Act, which would necessarily imply that the Madras Act should be held applicable only to statutory tenancies, and as not affecting contractual tenancies at all during their subsistence. On the contrary such a view is opposed (i) to the Preamble and the intendment expressed therein, (ii) to the definitions of 'landlord' and 'tenant' in the Act, (iii) to the self-sufficient code enacted in section 10 including a special machinery for eviction, (iv) to the provisions of section 7 which enacts specific inroads upon the rental agreements of contractual tenancies and (v) to the provisions of section 4 as to the fixation of fair rent, as available to all landlords and all tenants, as defined in the Act. Thus, the Madras Act has to be interpreted as a special Act which does abrogate the Transfer of Property Act, with reference to several of its provisions, of course, it goes further and applies, in its terms, not merely to contractual tenancies during their subsistence, but also to statutory tenancies, after the determination of a contractual tenancy Under the terms of this Act, therefore, a landlord can evict a tenant on the special grounds available, notwithstanding the subsistence of a contractual tenancy, and even though it has not been determined But, equally, the tenant has the protection of the Act, even after the termination of the contractual tenancy, so long as he does not do anything which removes the bar of eviction and provides no ground for eviction in terms of the Act Both during the subsistence of the contractual tenancy, and thereafter the parties have the right to get the fair rent determined This seems to be the only interpretation which does justice to the specific provisions of this statute, the legislative competence for such an enactment not being in question

We may here notice certain decisions cited at the bar, particularly by Sri Tiruvenkatachari, upon the relationship between a contractual tenancy and a 'statutory tenancy' and the principle that the jural relationship of landlord and tenant does not arise from mere nomenclature or any accidental features Thus, in *Shyamacharan* v *Sheojee Bhai*[1], a Bench of that Court held that a settlement *pendente lite* in a suit for eviction, by which the tenant undertook certain obligations of payment, did not create a fresh tenancy or leasehold right In *Sampath Mudaliar* v. *Sakunthala Ammal*[2], Jagadisan, J, held that the terms of a joint endorsement made in a suit, did not constitute the jural relationship of landlord and tenant In *American Economical Laundry* v *Little*[3], the Court held, with reference to section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that the daughter, who remained in possession after the death of the tenant, did not succeed to the tenancy, as her deceased father had suffered an order for possession. In *Mills* v *Allen*[4], the Court held that, after a warrant for possession had ceased to be effective the subsequent death of the tenant and succession by the first defendant, gave rise to a statutory tenancy in favour of the first defendant This line of cases had more relevance to the arguments based on the specific facts in Application No 2443 of 1963 in C S No. 163 of 1962, one of the proceedings before us.

We may now proceed to briefly notice the decisions of other High Courts, several of which are in point, in the sense that they have also noted certain provisions of the Madras Act. *Shambhooran* v. *Mangalsingh*[5] is important because the Rajasthan Act (XVII of 1960) was held to be only supplementary to the provisions of the Transfer of Property Act, without affecting those provisions in any manner For that reason, the assent of the President under Article 254 (1) of the Constitution was not required to make the statute effective In *Siddanna* v *Venkatesh*[6], a Division Bench of the Mysore High Court held, following *Punjalal's case*[7], that under Bombay Act LVII of 1947 a suit for eviction was not maintainable, unless the tenancy was both determined by a notice under section 106 of the Transfer of Property Act, and another notice as required by section 12 (2) of the Bombay Act We have already tressed the great difficulty in adopting such a view on the interpretation of the

1 A I R 1964 M P 288
2 (1964) 2 M L J 563
3 (1950) 2 All E R 1186.
4 L R (1953) 2 Q.B 341
5 A I R 1959 Raj 59
6 A I R 1965 Mys 65
7. (1963) 2 S C J 441

Madras Act, and the considerations against that view In *Pak Das* v. *House Rent Controller, Cuttack*[1], a Division Bench of that Court held that notice to quit under sction 106 of the Transfer of Property Act was not necessary for eviction proceedings under section 7 of the Orissa House Rent Control Act, 1958 It is interesting to note that the decisions of this Court in *Kishnamoorthy* v *Parthasarathy*[2], *Rangaswami Naidu* v *Bangaru Chetty*[3], and *Kuppuswami* v *Mahadeva*[4], were noticed and relied on Again in *Shri Hem Chand* v *Shrimati Sham Devi*[5], with regard to the Delhi and Ajmer Merwara Rent Control Act, a Division Bench held that the provisions of section 106 of the Transfer of Property Act, requiring the service of a notice on the tenant, had no relevance in considering the application for ejectment under this Act *Mohammed Ghouse* v *Karunnissa Begum*[6] was on the Hyderabad Rent Control Order, and the Division Bench held that the provisions of section 111 of the Transfer of Property Act did not apply to cases of ejectment of a tenant within the purview of this Order *Karamsay Kanji* v *Velji Virji*[7] is of great interest, as here Chagla, C J., was interpreting the application by a tenant for fixation of standard rent, in relation to a suit by a landlord for claiming contractual rent The same arguments, that have been urged before us, both with regard to the sanctity of contracts and the absence of a likelihood that the Legislature intended to make inroads on prior law, were pressed on the authority of the dicta in *Clift* v *Taylor*[8]. The learned Chief Justice pointed out that the Act was passed to control rents, in days of scarcity of accommodation, and to prevent a landlord from exacting unconscionable rents, and also to provide protection from unjust eviction Section 20 of that Act gave a right to the tenant to recover the amount paid to the landlord in excess of the standard rent Sections 4 and 7 of our Act, and indeed the entire scheme of the 1960 Act, render it clear beyond doubt that the tenant has a right to obtain a fixation of fair rent, whether it is a subsisting contractual tenancy, or a statutory tenancy that applies to his case Arguments based on the sanctity of contracts, or the likely absence of an intention on the part of the Legislature to make inroads upon property law, are, in my view, quite out of place in construing a statute, which has the special purpose of regulating the letting, rents and liability for eviction in respect of *all* tenancies of buildings in the State We would, therefore, unhesitatingly answer the reference in the form that, as far as the Madras Act is concerned, the right to apply for fixation of fair rent is vested in all landlords and tenants of buildings, both during the subsistence of a contractual tenancy and after its determination and, that, similarly the right of a landlord to apply for eviction on the ground specified in section 10 is not affected by the absence of a statutory notice under the Transfer of Property Act determining that tenancy.

On the facts of the present case, it is Messrs Raval & Company (tenants) who are objecting to the determination of a fair rent at the instance of the landlords, during the subsistence of the tenancy But that can make no essential difference, for, the adoption of the view pressed by Sri Tiruvenkatachari would automatically disentitle tenants from relief, who may be paying rents far higher than the fair rent, under agreements of tenancy, which might have a currency for years in future. As Jagadisan, J , pointed out in *Venkataswami* v *Abdul Rahim & Bros*[9], a fair rent is, essentially, a just rent, having regard to all relevant circumstances , it is not a rent favourable to the landlord, or favourable to the tenant, as such

We now turn to the aspect of the case which relates to Article 14, and the attack on Amending Act XI of 1964 both upon grounds of hostile discrimination, and infringement of rights guaranteed under Article 19

The argument based upon hostile discrimination (Article 14) will have to be considered, both for its proper appreciation and for the purpose of the imputation of *mala fides* against the concerned Minister, upon certain facts including the legislative history of the Amending Act XI of 1964 Upon the pleadings, as they stand, the

1 A I R 1962 Orissa 173
2 (1949) 1 M L J 412
3 (1948) 2 M L J 82
4 (1950) 1 M L J 72.
5. I L R 8 Punj 36
6 A I R 1931 Hyd 111
7 56 Bom L R 619
8 L R (1948) 2 K B 394
9 (1962) 1 M L J 406.

respective parties, in W P. No 1124 of 1963, are not agreed on the applicability of the Amending Act at all. The terms of the lease between Messrs Raval & Company, and the landlord are set out in the affidavit of Sri Damodaran for Messrs. Raval & Company inclusive of the original agreement that rent was to be Rs 225 per mensem that the lease should enure till 1st May, 1969, and that the lessees should further make an annual contribution towards repairs and a sum of Rs 230 towards property-tax. In paragraph 7 of this affidavit, the average monthly rental is claimed to be Rs 419 which would come within the ambit of section 30 of Act XVIII of 1960, only by virtue of the Amending Act XI of 1964 According to the affidavit for the landlords, the monthly rent is only Rs 225 with an additional 25 per cent and hence the premises were within the scope of the 1960 Act itself For the purpose of the argument, as based upon Article 14, we shall assume that, but for the amending Act XI of 1964, these non-residential premises will be wholly exempt from the Rent Control enactments, as argued by Sri Tiruvenkatachari. Indisputably, upon such issues of fact, concerning which there is controversy between the parties, this Court will not embark on a trial of the issue under Article 226 of the Constitution

On the matter of the *bona fides* of the concerned Minister, the record stands thus In the additional affidavit of Sri Damodaran for Messrs Raval & Company there is an allegation that, in respect of certain non-residential premises, in the lease of which the Minister has a direct interest, there was pressure from the landlord, and hence the Minister sponsored Madras Act XI of 1964, influenced by personal predilection and pique The concerned Minister has filed an affidavit before us, that with regard to these non-residential premises (Nos 6 and 7, Umpherson Street, Madras-1), the concerned private firm has an agreement in its favour that it is entitled to occupation of those premises on a rent of Rs 500 per mensem, so long as it is in business There was, hence no necessity for resort to the protection of the Rent Control legislation, in favour of the buildings, and the allegations are emphatically denied There is a reply affidavit on record in which Sri Damodaran frankly admits that his enquiries with the landlord were ineffective, and hence that the allegations of pressure in respect of these premises could not be proved We shall later discuss this question of *bona fides* on the legal aspect, either as relating to the Legislature, or as relating to the particular Minister Upon the record, we can only conclude that the allegations have been controverted and that there is no material of any kind to substantiate them.

The legislative history of the Amending Act his been stressed, in some detail, but it will clearly be travelling far outside the scope of this reference to embark upon an investigation of the legislative process, as relating to the Amending Act. However, a few salient features may be tersely stated It appears that the Select Committee upon the original Act (Act XVIII of 1960) recommended that the Act should not apply to non-residential buildings at all, and that, even with regard to residential buildings, it should be confined to tenants of the low and middle income groups, and that tenancies of the higher class be excluded An amendment was introduced by Government, which brought in the classification of residential and non-residential tenements within the scope of the Act Legislative Assembly Bill XXXVIII of 1961, was then brought as a private Bill, which proposed to substitute in section 30 the assessment formula, on which that section had been originally based, by the formula of actual rent paid by the tenant, which was accepted The consequence was that residential buildings, up to the rental limits of Rs 250 per mensem and non-residential buildings up to the rental limits of Rs 400 per mensem were brought within the Rent Control enactments, the Act not to apply with regard to higher rentals in both categories

Legislative Assembly Bill XVII of 1964 (Governmental Bill) was introduced into the Assembly on 28th March, 1964, and published by Gazette (Extraordinary) on the same day The Bill was taken up and passed in the Assembly on 31st March, 1964, and in the Council (Upper House) it was taken up on 21st April, 1964, and passed that day, it received the assent of the President on 5th August, 1964 According to the affidavits on record, both oral and written, from members of the business

community, concerning demands of exhoibitant rents from tenants of non-residential premises, and threats of eviction if these were not complied with, great injury to trade and industry, with consequential unemployment, was apprehended, unless these non-residential buildings on rentals exceeding Rs 400 per mensem were also brought within the scope of the Rent Control legislation

But Sri Tiruvenkatachari points out that the Statement of Objects is a repetition of the Statement of Objects in an earlier Bill LI of 1961, which had gone to the Select Committee, which committee disapproved of the deletion of clauses (ii) and (iii) of section 30, as was then contemplated According to the learned Counsel this essentially implies that there is a re-classification of tenements upon higher rentals hitherto exempt from the Act, which is a hostile discrimination against the landlords of non-residential buildings A certain document (page 35 of Volume II) is relied on to show that, though there was a demand in the Legislative Council for reference to a Select Committee, this was not complied with The haste of the legislative process, the absence of scrutiny by the Select Committee, the repetition of the same Objects and Reasons without any fresh basis for the discrimination, are all relied upon in support of the argument Per contra, the learned Advocate-General has placed before us the Rules of the Legislative Assembly, and pointed out that the legislative process has strictly been in order, any reference to a Select Committee has to be proposed and carried through as a resolution, and this was not done. Indeed, we are quite unable to see how this matter of the character, of the legislative process in this case, could at all be canvassed here The Legislature is presumed to have knowledge of the facts and conditions, which render a particular piece of legislation expedient and beneficial We have been referred to an extract from Ilbert's Legislative Methods and Forms (page 222) concerning the American Method of powers of initiating legislation and of scrutiny of Bills delegated to committees. Passages from Rottschaefer's Handbook of American Constitutional Law (1939 Edition) have also been adverted to, in support of the proposition that the reasonableness of legislative action cannot be determined, " without considering the factual situation existing when the legislation was enacted" (pp 454 to 460)

All that can be said on this aspect is that the Government claim that the Bill was sponsored in response to agitation and representations, both to the Chief Minister and the Minister for Industries, from numerous concerns, which were tenants of non-residential premises In the leading case upon Article 14, namely, *Shri Ram Krishna Dalmia* v *Shri Justice S R Tendolkar and others*[1], the learned Chief Justice has enunciated the criteria (page 297) and two of these are:

(1) A presumption in favour of the constitutionality of an enactment; and

(2) A presumption that the Legislature understands and correctly appreciates the need of its own people.

Again, the good faith of a Legislature must also be presumed, and an interesting catena of decisions on this aspect will be found in Keir and Lawson's " Cases in Constitutional Law," Fourth Edition (1954), page 301. As laid down in *Radio Corporation PHY Ltd* v *The Commonwealth*[2], the motives of a legislative body cannot be canvassed at all, and do not affect the validity of the legislation In *Fletcher* v. *Peck*[3], corruption of the members of the Legislature was actually alleged, but it was held that the *bona fides* of the exercise of legislative powers cannot be impugned; vide *Trustees Executors and Agency Co , Ltd* v *Federal Commissioner of Taxation*[4], and *Stenhouse* v *Coleman* [5] The Supreme Court of United States of America has taken the same view in *Hamilton* v *Kentuckil Distilleries Co* [6] We are unable to see how it could be alleged that the legislative history of this measure affords any basis, for the plea of hostile discrimination or inequality of treatment.

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1 (1959) S C J. 147 . (1959) 1 M L J. (S C) 67 : (1959) 1 An W R (S C) 69 (1959) S C R. 279, 297
2. (1937-1938) 59 C L.R 170 at 185.
3. (1910) 6 Cranch 27.
4 (1933) 49 C L R. 220 at 240.
5. (1944) 69 C L R 471.
6 251 U.S. 146 at 161.

The criteria with regard to the test of hostile discrimination have been enunciated in many decisions, and it is sufficient to refer here to the following that were cited before us, *Dalmia's case*[1], *Gulf C. & S F R Co* v. *Ellis*[2], *V M Syed Mohammad and Company* v *The State of Andhra*[3], *State of Madhya Pradesh* v *Bhopal Sugar Industries*[4], and *S M Transports (P) Ltd* v *Sankaraswamigal Mutt*[5] All these lay down that Article 14 of the Constitution embodies the principle that classification must be found on an intelligible differentiation, and that the differentia must have a rational relation to the object sought to be achieved by the statute in question The classification may be on different bases The decision in *State of Madhya Pradesh* v. *Bhopal Sugar Industries*[4], is particularly significant as it is stressed there that to make out a case of denial of the equal protection of the laws under Article 14, a plea of differential treatment, by itself, would not be sufficient The party advancing such a case must show that he had been treated differently from persons similarly circumstanced, without any reasonable basis, and that this was unjustified In *Chiranjit Lal Chouduri* v *The Union of India and others*[6], it has been laid down that there is a strong presumption in favour of the validity of legislative classification

In the present matter, it is difficult even to appreciate the plea of hostile discrimination urged on behalf of Messrs Raval & Company, who seek to impugn the Amending Act (XI of 1964) on this ground Firstly, the party advancing this plea is a tenant, and it is urged that landlords were subject to this hostile discrimination; it is not a landlord who is coming forward with the plea that he has been treated differently from those similarly situated Next, the classification of ' residential ' and ' non-residential ' tenancies has been adopted in many tenancy enactments and is a well-recognised and rational principle of differentiation Actually, this has been conceded by learned Counsel But, if this be conceded, and as the learned Advocate-General rightly stressed, hostile discrimination can be conceivably urged only if persons of this class (landlords of non-residential tenements) had been differentially treated Certainly, the argument is sustainable, that, on the contrary, it was the 1960 Act which prescribed some differential treatment with regard to landlords of non-residential premises, this was in the sense that only landlords of premises with rentals of Rs 400 and below were brought within the scope of the legislation

In our view there is no basis for the plea of hostile discrimination or the denial of equal protection of the law, either with regard to the Amending Act (XI of 1964), or with regard to the earlier Rent Control enactments, including the Act of 1960 The successive enactments, have embodied, a perfectly rational principle of classification, and the criteria and their application have been evolved, from time to time, in accordance with the needs of this class of citizens There is also a clear and discernible nexus between the object of the measure, and the differentia themselves As the measure stands today, if any group of tenants has a right to complain it is the group of tenants occupying residential buildings with rental of over Rs 250 per mensem who do not have the protection of these beneficial laws at all The entire argument has to be repelled, in the context of an evolving democratic State with farflung needs for legislation based upon intelligible differentia, in relation to the objects of such legislation In *Sha Manumal Misrimal* v *Natha Rukmani Ammal*[7], Venkatadri, J, has held that section 30 of Act XVIII of 1960 does not violate the equality guaranteed under Article 14 of the Constitution and is not void or *ultra vires* and that the classification of protected buildings and exempted buildings on the basis of the rent is a reasonable one, consistent with the object of the Act, and is not discriminatory

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1 (1959) S C J 147 (1959) 1 M L J (S C) 67 (1959) 1 An W R (S C) 67 (1959) S C R 279

2. (1896) 41 L Ed 686.

3 (1954) S C J 390 (1954) 1 M L J 619. (1954) S C R. 1117 at 1120

4 (1964) 1 S C J 555 (1964) 1 I T J 553.

5 (1964) 1 S C J 530 (1964) 1 M L J (S C) 146 (1964) 1 An W R (S C) 146

6 (1951) S C J 29 1950 S C R 869

7 (1964) 1 M L J 312.

A word is now called for with regard to the facts in C S No. 163 of 1962, and the points that have been urged before us concerning the interpretation of section 3 of Act XI of 1964 We need not dwell much upon the facts of C S No 163 of 1962, for the simple reason that, within the scope of this reference we are not dealing with the evidence of a particular action at all But it may be noted that the suit was one filed by the landlord (plaintiff) against the tenant (defendant), after the termination of the tenancy, for delivery of possession, mesne profits subsequent to the date of termination till the date of plaint, with future mesne profits, etc. There is also a compromise decree, which may complicate matters on the application of section 3 to this case. Section 5 provides as follows

> " Every proceeding in respect of any non-residential building or part thereof pending before any Court or other authority or officer on the date of the publication of this Act in the *Fort St George Gazette* and instituted on the ground that such building or part was exempt from the provisions of the principal Act by virtue of clause (iii) of section 30 of the principal Act, shall cease and determine and shall not be enforceable
>
> Provided that nothing contained in this section shall be deemed to invalidate any suit or proceeding in which the decree or order passed has been executed or satisfied in full before the date mentioned in this section "

It has to be immediately conceded that the wording of this section can by no means be described as happy or free from any cloud of ambiguity It is not very clear how a proceeding could have been instituted " on the ground that such building or part was exempt from the provisions of the principal Act by virtue of clause (iii) of section 30," or what is the precise scope of the rights and privileges which may accrue to the landlord, and which are to cease and determine However, the section does not require to be struck down, either on the ground that it infringes Article 14, or upon any other patent ground of *ultra vires* Its applicability to the stated facts of C S No 163 of 1962, such as the effect of this section on the compromise decree in that proceeding, is a matter quite outside the scope of the present reference.

We may now proceed to the other ground of constitutional validity urged before us, which is the effect of Article 19 either upon Amending Act XI of 1964, or upon the 1960 Act itself In this context, we may assume, for an analysis of the argument, that the interest possessed by a tenant in a lease is certainly ' property ' for the purpose of Article 19, equally with the interest of the landlords, vide *Bombay Corporation* v. *Panchan*[1] The learned Advocate-General has advanced two main contentions on this aspect, after noting them, we shall proceed to consider the argument that the 1960 Act infringes the rights guaranteed under Article 19 (1) (*f*) and goes beyond the scope of reasonable restrictions on such rights enunciated in sub-clause (5); it will be clear that this is the only matter that is open for the consideration of Court

The first point stressed by the learned Advocate-General is that a company is not a citizen, as has been held in *State Trading Corporation of India* v *Commercial Tax Officer*[2], and, in consequence, that Messrs Raval & Company cannot invoke the protection of Article 19 at all This apart, the learned Advocate-General makes the next point that, in the context of Article 358 of the Constitution, Article 19 will not restrict the power of the State to make a law which may infringe those rights, during the emergency, since the bar of Article 13 (2) will not be operative But it is not disputed that Act XI of 1964 was enacted during the emergency, and that Article 358 would therefore apply The Supreme Court held in *Mackhan Singh* v. *State of Punjab*[3] that " the suspension of Article 19 during the pendency of the proclamation of emergency removes the fetters created on the legislative and executive powers by Article 19 " In *Jan Mohammad Noor Mohammad Bagban* v *The State of Gujarat and another*[4], their Lordships of the Supreme Court again observed .

> " The President of India having declared in the month of December, 1962 a state of emergency in exercise of the powers reserved under the Constitution, the right to enforce the fundamental rights guaranteed under Article 19 of the Constitution remains suspended by virtue of Article 358 for the duration of the period of the emergency "

1. (1966) I S C J 49
2. A.I.R. 1963 S.C 1811.
3. A I R 1964 S C 318
4. A.I.R. 1966 S.C .385.

Sri Tiruvenkatachari contends, and we think rightly, that this will not prevent him from seeking to show that the Madras Buildings (Lease and Rent Control) Act XVIII of 1960 itself infringed Article 19 in certain respects, inclusive of the enacted right of a landlord or tenant to obtain a fixation of fair rent, notwithstanding a rent determined by a contractual tenancy, and hence that it must be struck down with reference to those provisions This matter came up before a Full Bench of the Assam High Court in *Shyam Behari* v. *Union of India*[1], The learned Judges held that the infraction of Article 358 on Article 19 was only in respect of a law enacted during the emergency, and the validity of an earlier law could certainly be challenged on the ground of violating Article 19 of the Constitution With respect, we agree with this view, and must hold that it is open to Sri Tiruvenkatachari to show that certain provisions of the 1960 Act were violative of Article 19 If that be so, the validity of Act XI of 1964 may not really arise, since, both in respect of eviction during a contractual tenancy, and the fixation of a fair rent, differing from the contractual rent, during its subsistence, the relevant provisions of the 1960 Act would have to be struck down, should the argument prevail The very basis for Act XI of 1964 will therefore disappear.

Upon this aspect, it is strenuously contended that it is not a reasonable restriction upon the right to property, to interfere, by means of a special enactment with the rent agreed upon between the parties during the subsistence of the tenancy-contract There is absolutely no justification for thus infringing the sanctity of a contract, and of property right, particularly as these Rent Control Acts, are, invariably, *ad hoc* and limited in time. An even more vehement argument is that, on the same basis, there ought not to be an eviction of a tenant, during the contract of tenancy, even though he may be guilty of 'wilful default' in the payment of rents, without first determining the contractual tenancy, where the contractual tenancy does not provide, by its terms, for eviction or forfeiture of the lease for non-payment of rent, this ought not to be introduced by a special enactment But, upon deeper scrutiny, it will be seen that this line of reasoning misses the significance of the Rent Control enactments altogether, in the context of rapid industrialisation, and accelerating urban rents for buildings Taking up the second limb of the argument first, it can easily be shown that this misses the true feature of the protection afforded to tenants, by the Rent Control Act That is a protection which, as their Lordships of the Supreme Court have pointed out, is extended to occupiers of buildings, even after the determination of the tenancy, who thus become 'statutory tenants', that is a powerful restriction on the right of a landlord to obtain possession of the leased premises, on determining the lease, under the ordinary law of property.

Having thus restricted such a right, by providing that neither during the subsistence of a contract of tenancy, nor thereafter, can the tenant be evicted so long as he fulfils certain terms, the Legislature has, in equity, imposed corresponding obligations on the tenants, whether contractual or statutory If they infringe those terms of protection, the landlord is given the right to obtain possession of the premises by the special machinery under the Act. The same argument is applicable to what are termed 'fair rents' under the Act Whether the contractual tenancy includes a stipulation for rent at a higher figure, or otherwise, both the landlord and tenant are entitled, notwithstanding the contract, to obtain this fixation, that is, a just and reasonable rent, and hence the provision is neither for landlords nor for tenants, but for both Such a restriction is eminently fair and equitable, during a period when economic forces might compel persons to contract for rentals which are unjust.

The following cases may be noticed upon this aspect. The right of the Legislature to impose reasonable restrictions upon this right to property has been noticed in *Bombay Corporation* v *Pancham*[2] In *Ram Krishna* v *Radhamal*[3], a Bench of the Allahabad High Court was concerned with the U P Rent Control Act III of 1947,

1. A I R. 1963 Assam 94 (F.B.)
2. (1966) 1 S C J 49.
3. A.I R 1952 All 697

and the Bench held that the restrictions enacted were reasonable and did not infringe Article 19 (1) (*f*) In *Venkatachellum* v *Kabalamuthy*,[1] Ramaswami, J., pointed out that these provisions or restrictions were essential in public interest during a period of scarce accommodation, and did not violate Article 19 (1) (*f*) The learned Judge has referred to several decisions of other Courts, similarly upholding enactments in other States In *Krishnan Singh* v *Rajasthan State*[2], Venkatarama Ayyar, J , pointed out, with regard to Article 19 (1) (*f*), in the context of the Marwar Land Revenue Act, that.

> " a fundamental right which a citizen has to hold and enjoy property imports only a right to recover reasonable rent and therefore a legislation whose object is to fix fair and equitable rent cannot be said to invade that right "

In *Subramania* v *Dharmalinga*[3], this Court held, with reference to section 3 (1) the Madras Cultivating Tenants Protection Act, 1955 and section 9 (2) of the Madras Cultivating Tenants (Payment of Fair Rent) Act, that they represented a valid exercise of the legislative power of the State, and that the restrictions imposed by these Acts on the fundamental rights guaranteed to the land owner by Article 19 (1) (*f*) were reasonable Indeed, we think it would be almost impossible to sustain any doctrine of the inviolability of contractual rights, in the context of the welfare legislation, which has become so marked a characteristic of modern times It is difficult to see how, if a Legislature could enact that an exorbitant rate of interest could be struck down by a Court and the debtor relieved against this, notwithstanding the terms of a contract, it cannot validly enact that both a landlord and tenant may apply for the determination of fair rent for premises, though the contract may be subsisting The same remarks would be applicable to many other restrictions upon property, imposed in numerous fields of human activity, which have been held to be reasonable.

In our view, therefore, the Reference must be answered in the terms that we have indicated earlier The Madras Rent Control Acts, viewed, from any perspective, such as that of legislative competence legislative intendment or the plain significance of the structure of the enactments, admits only of one interpretation, they interfere both with contractual and statutory tenancies, by affording a special protection to tenants against eviction, and also balancing this by certain corresponding obligations imposed on tenants For this reason, the determination of a contractual tenancy by notice under the Transfer of Property Act is not essential, for the landlord to obtain eviction on the grounds specified in section 10, as those are the very terms of the protection afforded to tenants, even after the determination of tenancies. The Act is a complete Code for Tribunals exercising this jurisdiction for the execution of the orders of such Tribunals, and for appeal and revision The absence of a *non abstante* clause does not affect the interpretation of the Act, with regard to the inroads it makes upon the previous property law of landlords and tenants of buildings Equally, it enables both landlords and tenants to seek the benefit of the fixation of fair rent, under its provisions, and by the special machinery provided, whether a contractual tenancy with different terms prevails, or it has been determined The Acts are within the competence of the Legislature and validly passed, including Act XI of 1964 None of them is liable to be struck down, either on the ground of hostile discrimination under Article 14, or on the ground that there has been an unreasonable restriction of fundamental rights guaranteed under Article 19 (1) (*f*) of the Constitution.

W P No 1124 of 1963, C R P No 1816 of 1963 and Application No 2443 of 1964 in C S No 163 of 1962 will now have to be remitted to the respective Courts, where they were pending, for disposal on the merits

V.K. *Reference answered accordingly.*

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1. (1955) 1 M L J 368
2. (1956) S C J 14.
3. (1959) 1 M L J 1 (F.B)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI

Ukaippaligal Munnai (firm), Madura and others *Appellants**

v.

V Ganesan and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 90—Setting aside Court auction sale on the ground of fraud or material irregularity—Scope of

The term 'irregularity' in Order 21, rule 90, Civil Procedure Code, means 'not being in conformity with the law or any recognised rule' The material irregularity complained of must be one on the part of the Court or its officers and it should be shown that there has been disregard of some positive provision of law relating to execution

It is no doubt true that a duty is cast upon a Court to make a proper valuation of the property put up for sale in execution and such valuation should be included in the sale proclamation. The duty is not discharged by merely stating the value respectively put up by the parties While the omission to state the estimated value of the property in the sale proclamation may not be by itself a material irregularity, if the Court includes the valuation it should be the fairly accurate value. But before an execution sale could be set aside on the ground of gross under valuation in the sale proclamation it should be established that substantial loss or injury has been occasioned to the judgment-debtor on account of such irregularity Where the judgment-debtor did not assist the Court in arriving at a proper valuation and allowed the sale to proceed and actually the property was sold at a price higher than what was anticipated by the judgment-debtor, it cannot be said that any substantial loss or injury could have occurred merely because the value stated in the sale proclamation was far lower than the actual price fetched in the sale.

Appeals against the orders of the Court of the Subordinate Judge of Madurai in E.A. Nos. 635 and 637 of 1961 respectively in E.P. No. 280 of 1960 in O.S. No. 10 of 1959 dated 22nd November, 1961, on its file.

S Tyagaraja Iyer, for *T. Martin*, for Appellants and for 3rd Respondent in A.A.O. No 94 of 1962

M. Sundaram, V. Narayanaswami, R. Ramasubba Iyer, T. R. Mani, K Rajah Iyer and *K. Sarvabhuman*, for Respondents

The Court made the following

ORDER —These two appeals arise out of execution proceedings in O S No. 10 of 1959 The appellants herein filed applications to set aside the sale in respect of two properties. The appellant in C.M.A. No 94 of 1962 is the petitioner in E.A. No. 635 of 1961 and she is a third party interested in lot 2, and the appellants in C M.A No 95 of 1962 are the petitioners in E A No. 637 of 1961. They are defendants 1, 3 and 4 who are interested in lot 1. They alleged in the applications that the sale was vitiated by fraud and material irregularities in the conduct of the sale, on the ground that the description of the properties were not properly given in the sale proclamation, that the sale proclamation itself was not properly published and that the properties sold in the public auction were grossly undervalued with a deliberate intention to mislead the bidders The Court below held that there was no fraud or material irregularity in the conduct of the sale. Hence the appeals.

The facts of the case reveal that lot 1 consists of a small house and shops and lot 2 consists of shops in Madurai Town The terms of the proclamation were settled on 18th March, 1961, lot 1 being valued at Rs 7,000 and lot 2 at Rs 6,000. The properties were proclaimed to be sold on 26th June, 1961. After several adjournments, lot 1 was sold for Rs 11,600 and lot 2 was sold for Rs. 40,000 subject to a mortgage for Rs 4,000 The appellants complain that it was the gross undervaluation of the properties in the sale proclamation that mislead the intending bidders and therefore the sale was vitiated with material irregularities in the conduct of the sale. Though the sale began on 10th July, 1961, it was continued from day to day and finally closed on 17th July, 1961. The sale was confirmed on 22nd November, 1961. The purchaser took symbolical possession in the month of December, 1961 and took physical possession in the month of June, 1962. The purchaser immediately put up

* A A O Nos. 94 and 95 of 1962. 4th February, 1966.

a huge structure worth about Rs 1,50,000-00. It is true that the judgment-debtors (appellants) have filed appeals. But they did not obtain stay of delivery of possession. Even though their application was dismissed on 28th March, 1962, they did not take any proceeding for stay of further construction by the purchaser. Now these appeals come up for final disposal after a period of four years

The only question for consideration is whether the sale has been vitiated by fraud and material irregularities. According to the appellants, lot 1 was grossly undervalued at Rs. 7,000 though as a matter of fact, it was sold for Rs. 11,600. Similarly, according to the appellants, lot 2 was grossly undervalued at Rs. 6,000 though, as a matter of fact, it was sold for Rs. 40,000. On the facts of this case, it is clear that the judgment-debtors were not put to any loss and they were not also prejudiced, because the properties were sold for more than what they themselves expected. At the time of settling the proclamation, the appellants did not help the Court in giving a correct estimate or value of the properties to be sold. It was only the decree-holder who gave valuation of the properties, and the Court, on an approximate valuation, fixed the upset price During the pendency of the Court-sale proceedings, one of the appellants filed an affidavit stating that he had entered into an agreement of sale with a private party in respect of lot 2 for Rs 35,000 and requested the Court to adjourn the sale. But the Court refused to adjourn the sale, and ultimately due to keen competition this item was sold for Rs. 40,000 subject to a mortgage, and lot 2 was sold for Rs. 11,000. In the circumstances it is not possible for me to say that the judgment-debtors are seriously prejudiced by the Court sale

But what learned Counsel for the appellants represents to me is that, if these properties were properly valued in the sale proclamation, any one of the properties would have been enough to satisfy the decree amount which was only Rs. 24,000 and therefore one of the properties could have been saved But the appellants did not take any steps or take appropriate proceedings for stopping the sale. On the other hand, they allowed the properties to be sold They did not obtain any stay of confirmation of the sale They allowed the purchaser to construct a huge structure worth about Rs. 1,50,000. Now they contend that the sale is vitiated by fraud and material irregularities.

True, in the law of execution, a sale will be and should be set aside, if there is fraud or any material irregularity in the conduct of sale Substantial injury should have been sustained by reason of such fraud or irregularity The term 'irregularity' means not being in conformity to some recognised rule There should be irregularity in the procedure to be followed for putting up the properties for sale. Material irregularity complained of must be one on the part of the Court or its officers. In determining what is illegal or irregular, it may be remarked that the distinction is one of degree. In order to establish illegality, there must be shown some disregard of positive provision of law. It is true that the duty of the Court is to make a valuation the result of which has to be included in the sale proclamation. Such duty is not discharged by merely stating the values respectively put up by the parties. Even assuming that such a duty has not been observed by the Court, the sale cannot be set aside, unless it is established that as a result of such irregularity, substantial loss or injury has been caused to the judgment-debtor Mere omission to state in the proclamation the estimated value of the properties to be sold will not be a material irregularity. The authorities are not uniform as to the duty of the Court in all cases or in normal cases to make the valuation, of the properties put up for sale. But if the Court includes its valuation, the value must be fairly and accurately stated In this case, the decree-holder gave the valuation according to his opinion. But the appellants did not help the Court by giving their valuation of the properties. It has been held that the Amin of the Court should not be sent to value the properties. The Court may fix the upset price But now the law seems to be that even the Court should not fix the upset price but only state the valuation of the property as given by the decree-holder and judgment-debtor and allow the property to be sold in public auction. In this case, the sale as regards lot 2 was continued for 7 days. After keen competition, this item was sold for Rs. 40,000 subject to a mortgage. In such

a case, it is not possible for me to say that the appellants suffered any loss Before a sale could be set aside on the ground of material irregularity, the judgment-debtor should establish a connection between the irregularity and the loss to the judgment-debtor on account of the property being sold for that price In the instant case, I cannot say that there was a deliberate mis-statement of the description of the properties calculated to mislead the possible bidders and thereby prevent them from offering adequate price or from bidding at all The properties in this case have not been sold for grossly inadequate price On the other hand, they have been sold for a substantial price which would represent the market value of the properties One of the judgment-debtors, during the pendency of the sale proceedings, requested the Court to adjourn the sale in order to enable him to sell lot 2 for Rs 35,000 at a private sale Though the Court refused to adjourn the sale, in Court auction the particular item was sold for Rs 40,000 I do not therefore, see how the appellants have sustained any substantial injury in the conduct of the sale On the other hand, they have been substantially benefited by Court sale on account of the keen competition evidenced by bidders at the sale Further the appellants themselves allowed the purchaser to put up a huge structure worth Rs 1,50,000 There is also no allegation of any fraud or *mala fides* on the part of the purchaser Nor did the appellants rush to Court when they came to know that the purchaser was putting up a huge building so as to prevent him from putting up the construction It was also brought to my notice that in connection with some other proceeding between the appellants and the respondents in some other suit, they have entered into a compromise to the effect that whatever surplus remained in the sale proceeds to the credit of O S No 10 of 1959, that would be availed of by the decree-holders in the suit In effect, that would mean that the appellants did not have any objection for the sale being confirmed in respect of these properties Even without taking into consideration this aspect of the matter, I am of opinion that it is too late for the appellants to come to Court and ask for the properties sold in Court auction, as a huge structure has been erected on the properties Further the sale is not vitiated by any fraud or material irregularity and the appellants are not put to substantial injury in the conduct of the sale. Under those circumstances, I do not see any reason to interfere with the order of the Court below.

The appeals are accordingly dismissed There will be no order as to costs.

R M. — *Appeals dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR M ANANTANARAYANAN, *Officiating Chief Justice,* MR. JUSTICE T VENKATADRI AND MR JUSTICE P. RAMAKRISHNAN

The Chief Controlling Revenue Authority, the Board of Revenue, Madras *Petitioner**

v.

The Jawahar Mills Ltd, Salem, represented by one of their Directors M S Odayappa Chettiar *Respondent*

Stamp Act (*II of* 1899), *section* 2 (17) *and Articles* 6 (2) (a) *and* 40 (b) *of Schedule I* (*Madras Amendment Act XIV of* 1958)—*Document if a mortgage or agreement relating to deposit of title-deeds, pledge or pawn—Test*

The definition of a mortgage under section 2 (17) of the Stamp Act is an inclusive one and it makes no distinction between a legal and an equitable mortgage as contemplated under section 58 of the Transfer of Property Act relating to several kinds of mortgages or section 17 of the Registration Act specifying compulsorily registrable documents The Stamp Act no doubt makes a special provision under Article 6 which relates to that class of documents which should be interpreted as an agreement or memorandum of mortgage by deposit of title deeds and not a mortgage in its own right The class of documents contemplated under Article 6 of the Stamp Act are those which merely contains the bargain between the parties with regard to the deposit of title deeds and probably conditions subsidiary or ancillary to the deposit of title-deeds If, however, the document contains provisions which would normally form covenants in a regular deed of mortgage, the mere fact that it also contains the bargain with regard to deposit of title deeds would not make it an agreement for the deposit of title

* R C No 5 of 1964 11th February, 1966.

deeds within the meaning of Article 6 If a document does not fall under the special provisions of Article 6 it should necessarily come within Article 40 of Schedule I of the Stamp Act While delivery of the title deeds simpliciter might itself create the charge any bargain between the parties accompanying such delivery of title deeds, if reduced to writing, then it is the written bargain that will govern the scope of the security Where the terms of the memorandum reduced to writing, in its own terms speaks of the relationship of mortgagor and mortgagee between the parties and mentions specific properties as the mortgage security and the debt as the amount due under the mortgage the effect of the document is a deed falling under Article 40 (*b*) of Schedule I to the Stamp Act and not one falling under Article 6 (2), even though the document refers to deposit of title deeds at the outset

In re, *Indian Stamp Act*, A I R 1954 Bom 462, followed

Case referred to the High Court by the Chief Controlling Revenue Authority, Madras, under section 57 of the Stamp Act, 1899, in the matter of an instrument dated 29th October, 1957, executed by the Jawahar Mills Ltd , Salem, regarding the duty chargeable on the said instrument, on his file, on the following question of law, namely :

" Whether the document, dated 29th October, 1957, under reference is agreement relating to deposit of title deeds, pawn or pledge falling under Article 6 (2) (*a*) or is mortgage deed falling under Article 40 (*b*) of Schedule I of the Stamp (Madras Amendment) Act of 1958

The Government Pleader, for State-Petitioner

V. K. Thiruvenkatachari, for *P Sharfuddin, V Srinivasan, M G Dastagir* and *T Srinivasan*, for Respondent

The Judgment of the Court was delivered by

Anantanarayanan, O C J—On the 29th of October, 1957, a document, which purports to be a memorandum of mortgage by deposit of title deeds, came into existence as between the Jawahar Mills Ltd , Salem, and the Indian Overseas Bank Limited. The document was presented for registration on 30th October, 1957, and it bore stamps under Article 6 of Schedule I of the Stamp Act The question referred to us for decision is, whether this is an agreement relating to the deposit of title deeds, pawn or pledge, falling under Article 6 (2) (*a*) of Schedule I, or is a mortgage deed falling under Article 40 (*b*) of the same Schedule, of the Stamp Act

Before proceeding to the details of the recitals in this document, which has two Schedules of properties attached, namely, Schedule 'A' and Schedule 'B'; it may be useful to briefly refer to certain relevant provisions of the Stamp Act, 1899, the Registration Act and the Transfer of Property Act. Section 2 (17) of the Stamp Act is an inclusive definition of a deed of mortgage, and, by its terms,

" includes every instrument whereby, for the purpose of securing money advanced, or to be advanced by way of loan, or an existing or future debt, or for the performance of an engagement, one person transfers, or creates, to, or in favour of, another a right over or in respect of specified property."

Article 6 of Schedule I is entitled "Agreement relating to deposit of title deeds pawn or pledge" and Article 6 (2) (*a*) would be the relevant category, if the agreement in the present instance dated 29th October, 1957, is not to be construed as one falling under Article 40 (*b*) of Schedule I Article 40 (*b*) of Schedule I relates to a mortgage deed, not being an agreement relating to deposit of title deeds, pawn or pledge (Article 6), when possession is not given or agreed to be given by the mortgagor. Section 17 of the Registration Act sets forth the categories of documents in respect of which registration is compulsory. Section 58 of the Transfer of Property Act deals with kinds of mortgages recognised by law, and under section 58 (*f*), a mortgage could be created by deposit of title deeds with regard to immoveable property, in specified towns, it is not in dispute that Salem town has been notified, as a town in which such a transaction could validly take place Under section 8 of the Transfer of Property Act, and the relevance of this will be later apparent, where the property transferred is machinery attached to the earth, the moveable parts thereof will also be included within the scope of the transfer as an essential incident. Under section 70 of the same Act, if, after the date of mortgage, any accession is made to

the mortgaged property, the mortgagee will ordinarily be entitled to it, in the absence of a contract to the contrary.

The question whether a particular document should be construed as a mortgage falling within Article 40 of Schedule I, or is merely an agreement or memorandum of the terms of a mortgage created by deposit of title deeds falling under Article 6 (2) (*a*), came up before a Special Bench of the Bombay High Court in In re *Indian Stamp Act*[1] In other words, the precise question which now concerns us arose for determination on the facts of that case Delivering the judgment of the Bench, Chagla, C J. referred to the definition of mortgage deed in section 2 (17), that we have set forth earlier. He then pointed out that the Stamp Act, *per se*, made no distinction between a legal and an equitable mortgage But the Legislature made a special provision in Article 6, which relates to that class of documents which should be interpreted, as an agreement or memorandum of mortgage by the deposit of title deeds, and not a deed of mortgage in its own right. The principle of differentiation between the two categories was expressed by the Bench in the following words

"In other words, if the document merely contains the bargain between the parties with regard to the deposit of title deeds, then although it creates an interest in immoveable property and although it is a mortgage deed, still by reason of the provisions of Article 6 the duty payable is less than the duty which would have been payable if it had been a mortgage deed in the larger sense of the term. It is clear that what was intended by Article 6 was a document which should merely contain the bargain between the parties with regard to the deposit of title deeds and, may be, conditions subsidiary or ancillary to the deposit of title deeds. But if we have a document which contains all the provisions which one would normally find in a mortgage deed, then the mere fact that the document also contains the bargain with regard to the deposit of title deeds would not make it an agreement for the deposit of title deeds

We may now turn to certain other decisions which have a bearing on the main argument, by virtue of the operation of section 92 of the Evidence Act In *Pranjivandas Jagjivandas Mehta* v *Chan Ma Phee*[2], the Judicial Committee was concerned with the precise implication of a mortgage created by the delivery of title deeds of property Obviously, the charge could be created by such a delivery *Simpliciter*, with nothing else agreed upon between the parties, or reduced to writing, in such a case, it is a presumption of law that the scope of the security is the scope of the documents of title Where, however, the title-deeds are handed over accompanied by a bargain, the terms of that bargain govern the rights of parties with regard to the scope of the security If the terms are reduced to writing, that memorandum, and that alone, "must determine what is the scope and extent of the security" The dicta of Lord Cairns in the leading case of *Shaw* v *Foster*[3], were cited to the effect that a bare deposit of the documents of title, without more, will, in equity, create a charge on the property referred to, but that where there is an actual written charge, the terms alone will govern the scope of the security In *Subramanian* v *Lutchman*[4], The Privy Council reiterated that such an agreement must be registered to prove a mortgage, and that where the terms are thus to be found in a registered document, "oral proof of the mortgage is inadmissible" In the language of Couch, C J., in another case "the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement"

In *Ashar Reza Khan* v. *Mohomed Mehdi Hossein Khan*[5], the Judicial Committee had before them deeds of mortgage and of sale and a certificate of sale, of shares in a Zamindari In the absence of words of exception or reservation, the documents were held to convey both the interests in the houses, on the land, and in the profits or rents derived from them. In *Berumull Sowcar* v. *Velu Gramany*[6], Patanjali Sastri, J. observed that where a person erected a superstructure on the site of which he was a tenant, and subsequently purchased the site from the landlord, the deposit of title deeds, though relating only to the land, would clearly cover the house, and create an equitable mortgage of the entire property of both site and superstructure

1. A I R. 1954 Bom 462
2. (1916) 31 M L J. 155 . I L R 43 Cal 895 (P.C).
3. (1872) L.R.E & I.A 321
4. (1923) 44 M L J 602 · I L R 50 Cal 338 (P C)
5. I L R 30 Cal 556 · L.R 30 I.A. 71 (P C)
6. (1942) 1 M L J. 372

We can now proceed to follow the argument of learned Counsel for the Jawahar Mills Limited, Salem, Sri V. K Thiruvenkatachari His argument is that the principle of differentiation is not correctly stated in the Special Bench decision in In re *Indian Stamp Act*[1], the passage from which was set forth by us earlier The law permits a mortgage by the deposit of title deeds under section 58 (*f*) of the Transfer of Property Act, and this we have already seen. Such a mortgage could be created, as observed by the Judicial Committee, either by a bare deposit, or by a deposit accompanied by the terms of a bargain, or by a deposit with an agreement or memorandum of the terms, in writing, which must be necessarily registered, to be admissible in evidence Where such a memorandum exists, no parole evidence is admissible on the terms of the bargain, because of the inhibiting force of section 92 of the Evidence Act This necessarily implies that the parties, in their own interest, should reduce *all* the terms to the writing of the agreement, including even minute particulars For this reason, the dicta in In re *Indian Stam Act*[1], to the effect that the document should merely contain the bargain between the parties and perhaps conditions ancillary to the deposit, but no other terms, may not be the statement of the correct position at law According to learned Counsel, since the parties are perfectly free to reduce every term of the bargain into writing and should indeed do so if they want to prove any term whatever, the dichotomy apparent in the Bombay decision may not be valid Where the document purports to recite the terms of a mortgage by deposit of title deeds, however, extensive and minute it may be, it falls under Article 6 of Schedule I, and not under Article 40. The linked argument is that the mere fact that the documents of title handed over related only to the actual lands, as in Schedule 'B' in the present case, will not prove either that the scope of the security could not validly include the factory buildings on the lands and the machinery installed therein (Schedule A), or that the wider scope of Schedule 'A' would imply that the document is a deed of mortgage falling under Article 40

We have carefully considered this line of reasoning, and, in our view, it cannot avail the respondent—(The Jawahar Mills Limited) on the very strong facts of the present case The document, in the present case, appears to us, beyond controversy, to be a document of a mortgage of properties in its own right, and not at all merely a memorandum of the terms of a bargain accompanying a mortgage by deposit of title deeds. Surely, one vital differentiating factor would be, the legal effect of the document, if we supposed that the title deeds were not actually deposited, or that some other title deeds not relevant to these properties had been deposited. It is here that we must refer to the explicit recitals of the present document, creating mortgage rights in favour of the mortgagee by its own terms of disposition, though the deposit of title deeds is referred to at the outset The following passages, in our view, are conclusive on this vital aspect.

" (1) That the properties hereby charged shall be and remain as continuing security for the balance from time to time due to the mortgagees.

(2) That the mortgagors do hereby declare and assure that the properties described in Schedule 'A' hereto belong absolutely to them and that no other person has any manner of right, title or interest . ... . . and that there is no encumbrance or charge

(3) That the mortgagors shall at all times during the continuance of the security hereby created . . ..

(4) (If the mortgagors neglect or refuse to effect insurance as agreed upon) 'it shall be lawful for but not obligatory upon the mortgagees to pay such premia and to keep the mortgaged properties so insured by the mortgagees for such purpose shall be charged to . shall be secured upon the mortgaged properties'

(5) That all moneys received under any insurance or any part of the property hereby mortgaged.

(6) That the mortgagors hereby undertake.

(7) Accelerating clause to the effect that 'on default of payment of any such quarterly interest the entire amount due under the mortgage hereby created shall become due and immediately payable'."

1. A I R. 1954 Bom 462

We have no doubt whatever that these recitals in the document create, by their own force, a mortgage, in favour of the Indian Overseas Bank Limited, in respect of all the properties of Schedules ' A ' and ' B ' quite apart from the deposits of title deeds under Schedule ' B ' On the present facts, we are further not able to accept the argument of learned Counsel (Sri Thiruvenkatachari), based upon section 8 of the Transfer of Property Act Even if we concede that the properties referred to in Schedule ' B ' (lands), which details the deeds of title deposited, must be held to include the factory buildings thereon erected prior to the mortgage, it is extremely difficult to see how any presumption can be drawn that the mortgage, by deposit of title deeds would include the electrical machinery, transformers, switch gear, generating sets etc , minutely particularised in Schedule ' A ' There is absolutely nothing to show that these are not separable machines, and it is noteworthy that even future acquisitions are, under the document, to be include in the security. Thus, this is a far stronger case for the interpretation of the document as a document of mortgage in its own right, than the case discussed in In re *Indian Stamp Act*[1] Nor is learned Counsel for the respondent able to explain, or account for, the specific words of the document creating a security in favour of the mortgagee, as upon the document itself, and quite apart from a deposit of title deeds, or the terms of the bargain of such a deposit We must, therefore, unhesitatingly answer the Reference to the effect that the document is a deed falling under Article 40 (*b*) of Schedule I of the Stamp Act Parties will bear their own costs

R M ——— *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. M ANANTANARAYANAN, *Officiating Chief Justice.*

Nagammal *Petitioner**

v

Mani and others *Respondents.*

Criminal Procedure Code (V of 1898), *section* 145 (1)—*Order under—Duty of Magistrate to apply his mind before promulgation of the notification*

Under section 145 (1) of the Criminal Procedure Code, before promulgating a notification the Magistrate must be satisfied that a dispute likely to cause a breach of the peace exists, concerning property within his jurisdiction and in his order he is required to state the grounds of his being so satisfied. Even where the Magistrate relies on the information laid by the police, the order should make it clear that the Magistrate has applied his judicial mind to the information and has come to a conclusion that he should take action under section 145 (1) of the Code

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate (J) Sankari in M C No 53 of 1965

B Soundara Pandyan for *P R Gokula Krishnan* and *R. Balasubramaniam,* for Petitioner.

R. Desikachari and *S Krishna Rao,* for Respondents

Public Prosecutor (*V P Raman*) on behalf of State

The Court made the following

ORDER.—In my view, the learned Sub-Divisional Magistrate (J) of Sankari, was perfectly justified in dropping further proceedings under section 145 Criminal Procedure Code, and, in dismissing the petition The facts are that the Revision Petitioner Nagammal (Party A) had moved the Executives Magistrate of requisite jurisdiction, for promulgating an order under section 145 (1) Criminal Procedurt Code, in respect of a small piece of land upon which some structures had been put up Party B opposed the claim of the Revision Petitioner to possession of this land, and, ordinarily speaking, the Executive First Class Magistrate of Sankari

1 A I R. 1954 Bom 462.

* Crl R C No 776 of 1965 (Crl R.P. No. 768 of 1965) 4th March, 1966.

would probably have been in order in taking cognizance, and in promulgating a notification under section 145 (1), Criminal Procedure Code Even so, the learned Sub-Divisional Magistrate (J) of Sankari, to whom the proceedings were subsequently transferred for disposal, had every jurisdiction to drop the proceedings, under section 145 (5), Criminal Procedure Code if he was satisfied that the dispute had ceased to exist

Actually, the proceedings had to be dropped, because the order of the Executive First Class Magistrate of Sankari is not in conformity with the requirements of the law As it is not a valid order, this particular proceeding had necessarily to be abandoned The law is very clear. Under section 145 (1), Criminal Procedure Code it is the Magistrate who must be satisfied that a dispute likely to cause a breach of the peace exists, concerning property within his jurisdiction, and, in his order, he is required to state " the grounds of his being so satisfied" In the present case, all that we have in paragraph 2 of the order is that information was laid by the Inspector of Police, Sankari, about this dispute Paragraph 3 then merely calls upon the parties under section 145 (1), Criminal Procedure Code, to produce evidence concerning the facts of possession Learned Counsel for the revision petitioner has drawn my attention to a decision of a Bench of the Tripura Judicial Commissioner's Court, reported in *Altab Ali* v *Jagadish Chandra*[1], which contains a statement of law that

> " the section does not say that the Magistrate should write in his preliminary order in so many words that he was *satisfied* "

The section does make it mandatory that the Magistrate should state in writing " the grounds of his being so satisfied " ; even if that particular word is not used, language to similar effect must be employed, and, the crux of the matter is that the order must make it evident that the Magistrate had applied his judicial mind to the information, and had come to the conclusion that he should take action under section 145 (1), Criminal Procedure Code In the present case, there is no such evidence. As far as I can judge from the order, the Executive First Class Magistrate seems to have thought that, when the Police laid some information concerning a dispute about property in his jurisdiction, which might lead to a breach of the peace, the Magistrate was thereupon bound to exercise his power under section 145, Criminal Procedure Code That is not the law, and, in that case action under this section would merely mean a form of police procedure, and not a judicial proceeding at all. I entirely agree with the view taken by the learned Sub-Divisional Magistrate that this order is void There is, of course, nothing to prevent the revision petitioner from moving the authorities again, if the dispute and the imminent likelihood of the breach of the peace still exist or the revision petitioner, if so advised, may file a civil suit for injunction in the Court of requisite jurisdiction

With these observations, the revision proceeding is dismissed

R.M. —— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR M ANANTANARAYANAN, *Officiating Chief Justice.*

A M Hussain . *Petitioner** .

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 3 (5) *and* 33—*Landlord interfering with the building after an allotment order—Offence—Onus*

Under section 3 (5) of the Madras Buildings (Lease and Rent Control) Act, 1960, it is the duty of the landlord to deliver possession of the building and fixtures in good and tenantable condition of the authorised officer or the allottee when once the building is taken over by the Government Any interference with the building or its fixtures will be an offence punishable under section 33 of the Act

Where the evidence clearly established that a building was in a good and tenantable condition at the time of the notification of vacancy and inspection by the Inspector, the allottee later saw the premises in good condition and paid an advance of Rs 100 , but it was found to have been rendered

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1 (1961) 2 Cri L J 292 at 294

* Crl R C No 875 of 1965 (Crl R P. No 863 of 1965) 4th March, 1966.

into a state of disrepair by the removal of fixtures, doors, lights and tap, *etc*, when the allottee visited the house that same evening and the building was in the control and possession of the landlord during the interval, the burden is on the landlord to explain how such a state of disrepair came into existence It is impossible to expect direct evidence in such a case nor is it possible to enter into any speculation whether a landlord would wantonly cause disrepair to his own property In the absence of proper explanation by the landlord, expecially in the context of his claiming higher rent and attempting to get a release of the building, it should be held that the landlord is guilty of the offence.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Chief Presidency Magistrate, Egmore, Madras, dated 4th March, 1965 and made in C C No 690 of 1965

P P. Selvarajan, for Petitioner

The Public Prosecutor (*V. P. Raman*), for State

The Court made the following

ORDER.—Upon the evidence, it appears to me that the learned Chief Presidency Magistrate was perfectly justified in convicting the revision petitioner (A. M Hussain) under section 3 (5) of the Madras Buildings (Lease and Rent Control) Act, 1960, read with section 33.

The facts, as they appear in the record, do not seem to be capable of being controverted at all They are so clear and definite It has to be conceded that this landlord (revision petitioner) duly notified the vacancy of this residential house, and an Inspector has inspected the house on 28th March, 1964, and made a report about the state of the building and the fixtures The new tenant, to whom the premises had been allotted by the Accommodation Controller, paid the advance, and made an inspection of the building as a preliminary measure, before entering into occupation He went to the house on 5th April, 1964, established contact with the landlord (revision petitioner) and gave Rs. 100 as advance, which was accepted On the same day, according to P W 1, the revision petitioner told him that the building was not in good condition and that he (the tenant) should decline to occupy it, as it was unfit for occupation On the evening of 5th April, 1964, the tenant again came to the building, and saw that the building had been altered into a state of considerable disrepair Electrical fittings, domes, etc, had been removed, the doors were dismounted and kept aside, and the tap had been removed The tenant made a complaint, upon which this prosecution followed under section 3 (5), which is to the effect that the landlord is bound to deliver possession of the building and the fixtures " in good tenantable repair and condition to the authorised officer or to the allottee " The conviction is for this offence, and a fine of Rs. 200 was imposed.

The main argument of learned Counsel for the revision petitioner is that his client is a Senior Development Officer of the Life Insurance Corporation, a person of respectability and responsibility, who is hardly likely to cause damage to his own building, in order to render it uninhabitable by the allottee. Unfortunately, it is not possible to proceed into this aspect in any depth, for the simple reason that this would be sheer speculation The logic of the facts, as established by the evidence, leads only to one conclusion The fixtures and doors were there a few days earlier and, the Inspector found, everything intact The key was with the landlord, and he was in control of the building, and that is not in dispute It is not alleged, for instance, that anyone else broke into the building, or that there were signs of unauthorised entry by third parties When the tenant went in on the evening of the 5th April, as I have earlier stated, he found the building uninhabitable, and the fixtures and fittings had been removed to such an extent, as to render it uninhabitable Normally, I would be reluctant to draw an inference against the landlord, merely because of these facts But, certainly, one would expect the landlord, who had possession and control of the building, to give some explanation for the disappearance of the fixtures, and for the removed doors. If that state of considerable disrepair had come into existence on or before the 5th April, without the knowledge of the landlord, or his connivance, there should be at least some explanation of

how such a state of affairs came into existence. As the section stands, it is impossible to expect direct evidence of the alteration of the state of the building by the landlord. There can only be evidence as in this case, based on the actual disrepair found, compared to an earlier stage when the fittings and fixtures were intact, and during a time when the building was in the entire control and possession of the landlord That is precisely the evidence that has been adduced here The landlord has not given any explanation whatever for the altered state of affairs He denied that the fixtures were there, and that the building was in any different state under the previous tenant, here, he is totally contradicted by the evidence.

Under the circumstances, I must confirm the conviction, as the evidence on record amply justifies it It is indeed difficult to believe that a responsible officer has wilfully worsened the state of the building, which might involve considerable expenditure for himself subsequently, just in order to prevent a tenancy, and so that he might obtain some higher rent But it is not without significance that the landlord was disputing the quantum of rental, and that he was also attempting to obtain a release of the building from the operation of the Act, according to the very admissions of his learned Counsel. However, I think that the landlord would have learnt a lesson by this prosecution, and will hereafter enforce his rights and carry out his obligations within the ambit of the law, and not by disregarding or contravening the law For this reason, I reduce the fine imposed in this case to one of Rs. 75, or, in default, to the same period of simple imprisonment. The execess amount of fine, if paid, will be refunded.

R.M. ——— *Conviction confirmed; Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR M ANANTANARAYANAN, *Officiating Chief Justice.*

Subramanian and others .. *Petitioners**

v.

Mari .. *Respondent*

Penal Code (XLV of 1860), section 441—Trespass—When an offence

It is now well settled that in order to constitute a trespass an offence punishable under section 441 of the Penal Code, it should be shown that the entry upon the property was with the intent to annoy, intimidate or insult The Court should be satisfied that causing annoyance or insult was the aim of the entry. It is not sufficient to show merely that the natural consequence of the entry is likely to cause annoyance or insult

Where the accused entered upon a piece of land in the honest belief that he had a right to enter the same for the purpose of cremating the body of a relation and ignored the protest of the person claiming to be in occupation as frivolous, and the accused was strengthened in his belief by a resolution of the Panchayat, even though incorrect, it cannot be held that the accused is guilty of an offence under section 441, Indian Penal Code, as the entry was not with the intent to cause annoyance

Vullappa v *Bhemma Rew*, (1917) 33 M L J 729: I L R 41 Mad 156 and *Mathri v. State of Punjab*, (1964) S C R 916, A I R 1964 S C 986, relied

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate, Tirupattur, dated 16th March, 1965 and passed in C A No. 16 of 1965 (C C. No. 1313 of 1964 on the file of the Court of the Sub-Magistrate, Chengam)

A. Viswanathan, for Petitioners.

The Public Prosecutor (*V. P. Raman*), for State

The Court made the following

ORDER—Section 441, Indian Penal Code, which defines the offence of criminal trespass, lays it down

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property . . . is said to commit criminal trespass"

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* Crl.R.C No 899 of 1965
(Crl R P No 887 of 1965) 25th March, 1966

There is another part of the definition which relates to a person who lawfully enters upon property, but unlawfully continues there with the same criminal intent, but this part of the definition does not now concern us

The case against the revision petitioners (accused 1 to 3) was a very simple one that they entered in the land assigned by the Government to Harijan Mari (P W. 1) with the assistance of the *thoti* or the cremation assistant, and had the cremation of the body of Chellammal, mother of accused 2 and 3, conducted on that land, in spite of the protests of P.W. 1 The appellate Court seems to have thought that the intention on the part of the revision petitioners to cause annoyance to P W 1 could be adequately based on the fact spoken to in the evidence, that there was protest when the revision petitioners, with the aid of the *thoti*, insisted on having the funeral pyre assembled on that land and the body cremated on that land As the record stands, I think that the Courts below are definitely mistaken The relevant principles are laid down by their Lordships of the Supreme Court in a passage which occurs in *Mathri* v *State of Punjab*[1] In view of this latest exposition of the relevant legal principles on a review of cases including the Full Bench decision in *Vulluppa* v *Bhemma Rew*[2], heir Lordships observed.

" In order to establish that the entry on the property was with the intent to annoy, intimidate or insult, it is necessary for the Court to be satisfied that causing such annoyance, intimidation, or insult was the aim of the entry, that it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the persons entering "

In the present case, the revision petitioners indisputably seem to have genuinely considered that place was some kind of burial or cremation ground, and that they had every right to have the cremation conducted there As the learned Public Prosecutor has been fair enough to point out, there is actually a resolution of the local Panchayat Board, which might well have confirmed or strengthened such an impression. The fact that that resolution may be incorrect on the merits, is quite irrelevant Apparently, having considered that they had a right to burn the body of the old lady in that field, the revision petitioners thought that the protests of P.W. 1, or of any one on his behalf, should be properly brushed aside and ignored They did not commit criminal trespass, though annoyance might have been caused to P.W. 1. They might be liable for civil trespass, and for damages arising from such trespass, if any But this is a matter upon which there is no need to express any view within the scope of the present proceeding The revision petitioners are acquitted, as the principles of law have not been correctly applied Their fines, if paid, will be refunded

R M. ——— *Revision allowed, Petitioners acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE T. VENKATADRI.

The Unique Motor and General Insurance Co, Ltd, Madras .. *Appellant**

v

M Kannappa Naicker and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 110—Insured heavy motor vehicle left in workshop for repairs—Accident during trial drive by mechanic carrying out repairs—Mechanic not possessing licence to drive heavy motor vehicles—Liability of insurance company

Tort—Master and servant relationship—Existence of—Test.

A transport company left a passenger bus belonging to it in a workshop for effecting repairs After the repairs were done the mechanic who carried out the repairs took out the bus for a test drive and during the course of this test drive he hit a boy 14 years old and caused his death The machanic had no licence to drive heavy vehicles to which category the bus which caused the accident belonged The vehicle was insured with an insurance company The insurance policy *inter alia* provided that the insurance company will not be liable in respect of any accident sustained or incurred while the motor vehicle was being driven by any person other than a driver On the question of the liability of the insurance company,

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1 (1964) 5 S C R 916 · A I R 1964 S C 986 at 991, para 18

2 I L R 41 Mad 156 (1917) 33 M L J. 729

*A A O No 84 of 1964 23rd December, 1965

Held, the insurance company was not liable to pay compensation either to the insured or to the father of the deceased boy

The mechanic who undertook the repairs was neither the servant nor the agent of the transport company to which the bus belonged Therefore the transport company had no control over him at the time of the accident and hence when the bus was involved in an accident, the policy of insurance was suspended at that time and it was during the period of suspension of the policy that the vehicle was driven by a person other than the driver of the transport company who further did not possess a valid licence to drive that vehicle In those circumstances the insurance company was entitled to ask for a declaration that they were not liable for the risk as the accident occurred during the period when the policy had been suspended

In determining whether the relationship of matter and servant exists, a number of questions may have to be considered like the nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances in which the payment of the reward may be withheld But a guiding and final test lies in the nature and degree of detailed control over the individual alleged to be in the relationship of servant The question of control is of considerable importance and Courts have carried the doctrine of control to such an extent as to make the owners of cars who retain control of the vehicle liable for the torts of persons to whom the car has been loaned without any relation of master and servant existing The owner of a vehicle is responsible for the negligent driving of such vehicle by his agent or servant if he retains control But the law has considerably extended the liability of the owner of the vehicle for the damage which may result from its negligent use Whether or not the owner be liable depends upon whether in fact he has retained control

Appeal against the Order of the Court of the Motor Accidents Claims Tribunal, Chingleput, dated 12th December, 1963 and made in O P No 71 of 1962

M R Krishna Iyer, for Appellant

K Parasaran, for 1st Respondent

R Sundaravaradan, for 2nd Respondent.

The Court made the following

ORDER —This appeal arises out of an order passed by the Motor Accidents Claims Tribunal (District Judge), Chingleput, awarding compensation in a sum of Rs 5,000 to the first respondent herein, whose son, a boy aged about 14, studying in VII Standard in the Municipal High School, Kancheepuram, died as a result of having been hit by a passanger bus, MDH 2265 owned by the second respondent-transport company The appellant was also made a party in the claim petition of the first respondent, as the bus was insured with them The Insurance Company has preferred this appeal canvassing the correctness of the decision of the Tribunal in awarding compensation to the first respondent They have contended that there is no liability to pay compensation, as there was a breach of the conditions incorporated in the Insurance Policy The Tribunal below has negatived the contention of the Insurance Company and directed the Insurance Company to pay the compensation amount. Therefore the question that arises for my consideration in this appeal is whether the Insurance Company is liable to pay compensation to the father of the deceased boy It is, therefore, necessary to state some more facts

The second respondent-transport company are the owners of the passenger bus MDH 2265, which has a seating capacity of 47 including the driver On the fateful day, this bus was not in use or service, as it had been left with the Rural Bus Workshop for effecting repairs to the said bus The repairs were carried out by one mechanic, Palaniswami by name After the repairs, he took out the bus for a test drive, and it was during the course of the trial drive that the unfortunate accident occurred to the son of the claimant It is in evidence that Palaniswami is not in possession of an effective driving licence authorising him to drive heavy vehicles He has been given a licence only to drive motor cars (light motor vehicles). Under no stretch of imagination can he be said to possess a licence to drive heavy vehicles like an omnibus Therefore learned Counsel for the appellant-Insurance Company contended before me that, when the bus was handed over to the workshop for repairs, the Insurance policy was suspended for the time being He further contended that it was during that period of the suspension of the policy that Palaniswami, the mechanic who did not possess the requisite driving licence to drive a heavy vehicle, took out the bus in question and caused the accident to the son of the claimant.

Learned Counsel therefore contended that the Insurance Company would not be liable to pay compensation either to the insured or the father of the deceased boy, on account of the deliberate breach of the conditions of the policy

It will be useful to refer, in this connection, to the relevant conditions in the Insurance Policy, under the head '*General Exemptions*'

"The company shall not be liable under this policy in respect of

(1) . . . .

(2) . . . .

(3) any accident, loss, damage and/or liability caused, sustained or incurred whilst the motor vehicle is

(*a*) ....

(*b*) being driven by any person other than a driver."

Learned Counsel has contended that Palaniswami is not a driver of the bus, that further he does not possess a valid licence to drive heavy vehicles and that therefore the Insurance Company would not be liable to pay compensation to the father of the deceased boy. Palaniswami has himself admitted that he has no licence with 'heavy' endorsement. The Tribunal has observed that it could not be said that Palaniswami was driving without a licence. I am unable to agree. A 'heavy motor vehicle' has been defined in section 2 (9) of the Motor Vehicles Act as a transport vehicle or omnibus the registered laden weight of which exceeds 8,200 kilograms; and section 2 (13) defines a 'light motor vehicle' as a transport vehicle or omnibus the registered laden weight of which does not exceed 3,000 kilograms Merely looking at the definitions, one can safely say that an omnibus having a capacity for 47 passengers is certainly a heavy vehicle Once I come to the conclusion that the bus in question is a heavy motor vehicle, I must also conclude that Palaniswami did not possess a licence to drive the bus in question which is a heavy vehicle. Therefore the appellant-Insurance Company is right in their contention that, when Palaniswami took the bus for a test drive, he did not possess the requisite licence for driving it and that further the bus was driven by a person other than a driver.

In regard to the contention urged by learned Counsel for the appellant that in any event the policy was suspended for the time being when the bus was handed over for repairs, it is useful to refer to the passage in Halsbury's Laws of England, Third Edition, Vol 22, page 234, paragraph 445

"There may, however, be an alteration not affecting the identity of the subject-matter which amounts to an alteration of the risk if by reason of the alteration the risk as altered ceases to correspond with the risk as defined in the policy Unless the policy expressly so provides, the alteration of the risk does not avoid the policy, but merely suspends its operation during the continuance of the alteration If the subject-matter is returned to the locality described or is again used in accordance with the description, the policy re-attaches"

In *Robberts* v *Anglo-Saxon Insurance Association Ltd*[1], a vehicle was insured for commercial travelling When it was used for carrying passengers and an accident occurred, it was held that the insurers were not liable, as that was not within the risk described The use of the vehicle for an unpermitted purpose does not, however, in the absence of a clear provision to that effect, give the insurers a right to avoid the policy altogether for all time and for all purposes The result is merely to suspend the operation of the policy for the duration of the unpermitted use As soon as the unpermitted use ceases and use for a permitted purpose is resumed, the policy again attaches itself It is usual in the business of motor insurance to provide a clause of suspension of policy under certain circumstances All policies contain a number of general exceptions and the operation of any one of the exceptions entitles the insurers to repudiate the liability under the policy If we apply the above principles to the instant case, it is clear that the owner of the vehicle did not give his consent to Palaniswami to drive the vehicle Nor did Palaniswami obtain the consent of the owner of the bus to take out the bus for the test drive Further, Palaniswami could not be called either the servant or the agent of the insured He is after all an independent person who undertook to effect the repairs of this

1. 137 L.T 243.

motor vehicle. Learned Counsel for the appellant brought to my notice the case of *Hewitt* v *Bonvin*[1]. In that case, with the permission of his mother, a son took out his father's car. The son wanted the car for his own purposes in order to drive two girl friends home On the way back, through the negligent driving of the son, the car was upset and a friend who had accompanied the party was killed. In an action by the administrator of the deceased friend against the father, the owner of the car, it was held by the Court of Appeal, that the son was not driving the car as his father's servant or agent or for his father's purposes and that therefore the father was not liable for his son's tortious act Applying the principle of that case to the facts of the present case, I feel that Palaniswami when he was driving the heavy motor vehicle was not either the servant or the agent of the owners of the motor vehicle. Palaniswami was not under their control and he was not given any directions at the time of the carrying out of the repairs. As observed by Du Parco, L J. in the judgment just cited, it has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible, merely by reason of his ownership, for any damage which it may do in that other's hands.

In determining whether the relationship of master and servant exists, a number of questions may have to be considered like the nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances in which the payment of the reward may be withheld But a guiding and final test lies in the nature and degree of detailed control over the individual alleged to be in the relationship of servant The question of control is of considerable importance, and the Courts have carried the doctrine of control to such an extent as to make the owners of cars who retain control of the vehicle liable for the torts of persons to whom the car has been loaned without any relation of master and servant existing The owner of a vehicle is responsible for the negligent driving of such vehicle by his agent or servant, if he (owner) retains control But the law has considerably extended the liability of the owner of the vehicle for the damage which may result from its negligent use. Whether or not the owner be liable depends upon whether in fact he has retained control In this connection, it is useful to refer to the decision in *Chowdhary* v. *Gillot*[2], where the plaintiff took his motor car to the manufacturers for repairs and, after handing it over to the company's receptionist, he asked if he could have a lift to the nearest railway station The manufacturers' servant was instructed to drive him to the station in the plaintiff's own car An accident occurred, owing to the negligence of the driver of the company In an action brought by the plaintiff for damages, it was held that having received the car for repairs, the company were, at the time of the accident, in possession of it as bailees and, so long as the bailment continued, the owner had no right to control the bailees' servants. It was therefore held that the company was liable for the driver's act of negligence Similarly, in *Lakshminarayan Ram Gopal & Son* v. *Hyderabad Government*[3], their Lordships of the Supreme Court drew the distinction between master and servant and principal and agent thus.

> " Generally, a servant is a person who not only receives instructions from his master but is subject to his master's right to control the manner in which he carries out those instructions An agent receives his principal's instructions but is generally free to carry out those instructions, according to his own discretion. "

His Lordship Bhagwati, J , also extracted the following passage in Halsbury's Laws of England—Hailsham Edition—Vol. I, at page 193, Article 345, where the positions of an agent, a servant and independent contractor are thus distinguished:

> " An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work , an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result An agent, though

1 L R (1940) 1 K B 188
2. (1947) 22 All E.R. 541.
3 A.I R. 1954 S C 364

bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal "

On a review of the case-law on the subject, I am of opinion that Palaniswami the mechanic who undertook to repair the bus belonging to the second respondent-company is neither his servant nor his agent but an independent contractor Therefore the second respondent-company had no control over him at the time of the accident, and therefore when the second respondent-company's bus which has been insured with the appellant-company was involved in an accident, the policy of insurance was suspended at that time and it was during the period of suspension of the policy that the vehicle was driven by a person other than the driver of the transport company who further did not possess a valid licence to drive that vehicle In those circumstances, the appellant-Insurance Company is entitled to ask for a declaration that they are not liable for the risk, as the accident occurred during the period when the policy has been suspended The claimant will be entitled to get compensation only from the owner of the bus-company, that is the second respondent herein

In the result, the appeal is allowed There will be no order as to costs.

V K. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR P CHANDRA REDDY, *Chief Justice*, AND MR JUSTICE T VENKATADRI

Madras State Wakf Board represented by its Secretary . *Applicant**

v.

B A Jamal Muhammed and others *Respondents.*

Wakf Act (XXIX of 1954) as amended by Act (XXXIV of 1964), sections 3, 6 and 56—Wakf property—What are—Notice under section 56 before suit—Nature of—If mandatory

Words and Phrases—' Thaikal '—Meaning of.

After the amendment of the Wakf Act of 1954, by section 66-C of the Amending Act of 1964 the scope of the definition of wakf under section 3 of the Act has become considerably enlarged Even properties donated by persons not professing Islam would be part of the Wakf property if they are given for the support of a wakf in the nature of a mosque, grave-yard, choultry, *etc*

' Thaikals ' in Tanjore District *prima facie* mean Muslim grave-yards

The provisions of section 56 of the Wakf Act relating to notice before the institution of any suit is analagous to section 80 of the Civil Procedure Code. It lays down an absolute bar to the institution of any suit against the Wakf Board in respect of any act purporting to be done by it in pursuance of the Act or the Rules framed thereunder unless the requisite notice is served on the Board before the institution of the suit The section would apply not only to common law suits but also to statutory suits. It is no doubt true that under section 6 of the Act certain suits instituted by the Wakf Board may not attract the provisions of section 56 of the Act relating to notice But that is no reason why the provisions of section 56 could not apply in cases of suits against the Board The section is couched in general terms and it covers all suits which question any act of the Board, whether they be voluntary or involuntary The section imposes a statutory and unqualified obligation upon the Courts to dismiss a suit for non-compliance with its provisions

Appeals against the Decrees of the Court of the Subordinate Judge, Kumbakonam in Appeal Suit Nos 169 and 168 of 1960, preferred against the decrees of the Court of the District Munsif of Valangido at Kumbakonam in Original Suit Nos 14 and 14 of 1960 respectively

M. M Ismail and *M A Sathar Sayeed*, for Appellants

The Advocate-General (*N Krishnaswami Reddy*), *K Rajah Ayyar*, *V. Seshadri* and *K. Hariharan*, for Respondent

The Judgment of the Court was delivered by

Chandra Reddy, C J—These two appeals arise out of two suits instituted by the respondents for a declaration that the properties involved in them are not wakf

* S.A. Nos. 1734 and 1741 of 1961. 20th December, 1965.

properties The subject-matter of the litigation are two bits of lands measuring 5 acres 28 cents and 2 acres 26 cents, punja, in Rajagiri Village of Thanjavur District As required by the provisions of section 4 of the Wakf Act, 1954, which will hereinafter be referred to as the Act, one of the Assistant Commissioners appointed under the Act enquired into the nature of the several endowments attached to Muslim institutions in Thanjavur and submitted a report to the State Government of Madras The State Government, in its turn, forwarded this report to the Wakf Board The Wakf Board, after examining it, published a list of wakfs existing in the district of Thanjavur in the Fort St George Gazette dated 24th December, 1958 This list included the subject-matter of these appeals

It may be mentioned here that these properties were attached to the Thaikals called Anaikara Thaikal and Sheik Mallick Thaikal They were purchased by the predecessor in interest of the respondents in or about the year 1944 for proper consideration The plaintiffs brought the suits for the reliefs mentioned therein in the Court of the District Munsif of Valangiman at Kumbakonam against the Madras State Wakf Board The basis of the suits was that the grants were personal to the ancestors of the vendors of these properties, and that, in any event, they were not wakfs within the ambit of section 3 of the Act

These suits were opposed by the Wakf Board on the objections that the properties constituted wakfs within the connotation of section 3 of the Act and that in any event the suits were not maintainable in that the statutory notice was not issued by the plaintiffs before the institution of the suits

While holding that the grants were to the two Thaikals and that the plaintiffs had not acquired any right thereto by adverse possession and that the sales in question were not valid and could not confer title as to the suit properties to them, the learned District Munsif decreed the suits in the view that they were not wakf properties as defined in section 3 (1) of the Act He overruled the plea regarding the notice as he felt that these suits did not require the issue of notice before commencing the litigation On appeal by the Board the Subordinate Judge, Kumbakonam, agreed with the conclusions of the District Munsif with the result that the decrees complained against were affirmed It is this judgment of the Subordinate Judge that has given rise to these two appeals

It may be mentioned here that during the pendency of the appeals before the Subordinate Judge a Bill was introduced in the Madras Legislature containing some provisions enlarging the scope of section 3 of the Act But, as it had not been passed into an Act the applicability of those provisions was not considered by the Subordinate Judge This Bill became an Act during the pendency of the Second Appeals When these appeals came on for hearing before our learned brother Natesan, J , learned Counsel for the appellants relied upon the relevant sections of Madras Act XIX of 1961. As the constitutionality of this Act was questioned by learned Counsel for the respondents on the ground that the assent of the President had not been obtained, the learned Judge referred the matter to a Division Bench. After this reference to the Division Bench the Union Parliament had enacted the Wakf (Amendment) Act, 1964 inserting section 66-C which takes in the properties donated by even persons not professing Islam for the support of a wakf within the ambit of the Wakf Act, 1954 This rendered the Madras Act XIX of 1961 superfluous

The questions that are posed before me in these Second Appeals are whether these endowments answer the description of wakf by user as defined in section 3 (1) of the Act and whether the failure to issue the statutory notice is fatal to the suits.

Having regard to the view we have taken of the applicability of the provisions relating to the issue of notice it is not necessary for us to deal with the other issues at any length However, we shall just indicate our *prima facie* views in these matters.

As mentioned earlier, both the Courts below were inclined to hold that the properties were not wakf because they were endowed by Hindu Rulers and not

by a person professing Islamic faith Dealing with the contention of the Wakf Board that even otherwise they are wakf properties for the reason that they had been treated as such for several generations the Courts below reached the conclusion that the properties could not answer the description of wakf by user having regard to the known origin thereof. It does not require much of an argument to say that this conclusion is a fallacious one. If originally they were wakfs as defined by the section there is then no need to invoke the inclusive definition Under the latter definition the only requirement is that the properties should be shown to have been used as wakf for a long time It is interesting to note that the District Munsif, with whose opinion the Subordinate Judge concurred, stated;

"So with the significance to be attached to the expression Thaikal, with the Government Revenue records referring to the property as Devadayam and with the law recognising the gift to a Takia as a wakf as understood in Muslim Law, the net result of the evidence as discussed above leads to the conclusion that the dedication in the present case is one which would amount to a wakf within the meaning of the Muslim law."

Basing himself on these remarks Sri Ismail urges that the properties should be regarded as having been used as wakfs and therefore the suits should be dismissed on this ground It is contended on the other side that these observations were made by the learned District Munsif in connection with the controversy relating to the nature of the wakfs and that they should not be regarded as a finding that the properties were used as wakfs and if we are with him on the other points the matter has to be sent back to the trial Court for reconsideration of the whole issue We would have accepted this suggestion if it had become necessary although *prima facie* it looks as if the properties were wakfs by user.

On the question whether Act XXXIV of 1964 would advance the case of the appellant it is submitted by Sri Rajah Ayyar, appearing for the respondents, that the properties are not governed by any of the sections of Act XXXIV of 1964 It is convenient at this stage to read section 66-C which has widened the scope of section 3 of the Act of 1954 That section says

"Notwithstanding anything contained in this Act where any movable or immovable property has been given or donated by any person not professing Islam for the support of a wakf being—

(*a*) a mosque idgah, imambara, dargah, Shangah or a meqbara ;

(*b*) a Muslim graveyard ,

(*c*) a choultry or a muzafarkhana,

then such property shall be deemed to be comprised in that wakf and be dealt with in the same manner as the wakf in which it is comprised"

The question that is debated is whether Thaikal could be considered to be a Muslim graveyard Sri Rajah Ayyar contends that since there was no consideration of the question by the trial Court as to the character of these Thaikals it would not be safe to treat them as Muslim graveyards and apply the provisions of section 66-C of Act XXXIV of 1964, whereas Sri Ismail says that there can be little doubt that the Thaikals are Muslim graveyards or dargahs within the pale of section 66-C Although there seems to be more force in the argument of Sri Ismail we are relieved of the necessity of either expressing any final opinion or sending back the case to the trial Court having regard to the view we have taken of the relevant provision of the Act necessitating the issue of notice before the institution of the suits under this Act.

Before dealing with the relative contentions of the parties relating to the need for the issue of notice before suit it is useful to read section 56 of the Act which has a bearing on this controversy That section recites

"No suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any Rules made thereunder Until the expiration of two months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left"

The clause that falls to be construed by us is "any act purporting to be done by it in pursuance of this Act or of any Rules made thereunder". Sri Rajah Ayyar's

contention is that the present suits are outside the purview of this section because no grievance is made of any act of the Board and that this section is inapplicable to statutory suits, being relevant only in the context of common law suits and that section 6 provides a special right of suit which does not attract section 56 of the Act

Before we consider the validity of this argument it is convenient to look at section 6 of the Act. Section 6 reads.

> " (1) If any question arises whether a particular property is wakf property or not or whether a wakf is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a civil Court of competent jurisdiction for the decision of the question and the decision of the civil Court in respect of such matter shall be final."

The other provisions of this section are not of immediate relevancy and therefore need not be extracted. The comment made by Sri Rajah Ayyar on the language of this section is that this section enables either a Wakf Board or a mutawalli or any person interested in the wakf to have resort to the section If that were so it is unreasonable to expect only one category of plaintiffs to issue a notice since the other two, *viz*, the Mutawalli and the Wakf Board are exempt from the operation of section 56 of the Act At the outset it must be mentioned that it is not correct to say that a mutawalli need not comply with the terms of section 56 It is only the Wakf Board that does not fall within the ambit of section 56 This is not an argument that can carry conviction to any Court If that is the effect of section 56 it is no use complaining that discrimination is made between private individuals and the Wakf Board.

In this connection it is relevant to refer to section 80 of the Code of Civil Procedure which recites (in so far as it has a bearing on this enquiry).

> " No suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of . . . "

Indisputably, section 80, Civil Procedure Code, puts the Government in a favoured position in that when it has to file a suit against the party in respect of a transaction it need not give notice whereas in respect of the same transaction if the parties are put to the necessity of instituting the suit against the Government they are bound to issue a notice under that section For instance if a suit is to be filed by the Government against a party for breach of a contract entered into between them no notice need issue But if a private party has to lay an action against the Government in respect of the same transaction, section 80, Civil Procedure Code, makes it incumbent upon the plaintiff to serve notice on the Government Is it of any avail to the private party to complain that he is forced to comply with the provisions of section 80, Civil Procedure Code, while there is no such requirement in regard to the Government? This argument, therefore, does not merit much discussion

The submission that statutory suits fall outside the pale of section 56 of the Act is equally untenable It should be remembered in this connection that this section is couched in general terms and it takes in all suits which complain against any act of the Board irrespective of the fact whether it is a statutory suit or a common law suit, and, we find no justification to read a restriction into it. We are not also persuaded that the act referred to in the section can have reference only to voluntary acts.

It does not require much of an effort to repel this argument that the word 'act' is applicable to voluntary acts. It covers both voluntary and involuntary acts

Nor can it be postulated that what the Board did in publishing the list of wakfs under section 5 of the Act is not a voluntary act The Board does certainly exercise its volition in issuing a list of wakfs after scrutinising the reports submitted by the

Commissioner. Be that as it may, the construction suggested by Sri Rajah Ayyar is not warranted by the meaning of the word 'act' To deal with the last of the arguments we do not find anything special about the nature of the suits provided by section 6 of the Act. It is one of the three types of suits contemplated by the Act, the other two being those provided by section 15 (3) and section 27 of the Act. Section 15 (3) gives the right to the aggrieved party to challenge the action of the Board in settling a scheme of management whereas section 27 enables the concerned party to bring a suit questioning the decision of the Board as regards the character of the property We find no justification to distinguish suits under section 6 from those under sections 15 (3) and 27 of the Act

Section 56 has to be interpreted in its widest amplitude when the terms are express, explicit and mandatory and do not admit of any exception It is expressed in very wide language and there is no warrant for excluding its application in suits under section 6 of the Act. To read a qualification into it would be, to borrow the language of their Lordships of the Privy Council in *Bhagchand Dagdusa* v *Secretary of State for India*[1], an encroachment on the function of the Legislature In our opinion this section imposes a statutory and unqualified obligation upon the Courts to dismiss a suit if there is no compliance with that section.

It is worthy of note that section 56 is analogous to section 80, Civil Procedure Code, and this section, as section 80, Civil Procedure Code, has been construed as applying to all types of suits against the Government It has been laid down in *Bhagchand Dagdusa* v *Secretary of State for India*[1], that that section applies to all forms of suits and whatever the relief sought, including a suit for an injunction, and, this proposition was reaffirmed in *AL. AR Vellayan Chettiar* v *Government of Madras*[2] and was approved and followed by the Supreme Court in *State of Madras* v. *C P. Agencies*[3]. Having regard to the comprehensive nature of the terms of section 56 of the Act we have no option but to agree with learned Counsel for the appellant that the Board could seek protection is section 56.

Sri Rajah Ayyar draws our attention to a judgment of the Calcutta High Court in *Commissioner of Wakfs* v *Mohammed Jehangir*[4] We feel that this ruling is not in point and therefore need not be referred to in detail There the relief asked for was for a declaration that certain entries in the cadastral survey were wrong The question posed there was whether a statutory notice was necessary in that case The learned Judges said that it was not necessary for the reason that the act in respect of which the prayer was asked could not be regarded as the act of the Commissioner, and further, the Commissioner was added as a party only subsequently though he was not even a necessary party. It was under those circumstances that the Calcutta High Court ruled that the omission to issue a notice was not fatal to the suit.

Sri Rajah Ayyar then relied on the decision in *S C Board of Wakf* v. *Sirajul Haq*[5]. According to him this decision is an authority for the proposition that if the word relief is not found in the section, any suit which claims a relief of a particular nature is not hit at by the section requiring the issue of a notice. What happened there was this In pursuance of the enquiry required to be done under the Muslim Wakfs Act the Sunni Central Board notified in the Official Gazette of 26th February, 1944, the wakfs including the wakf which was the subject of dispute in the list of Sunni wakfs. Most of the property appertaining to the wakf was also notified in the relevant clause against this wakf. After this notification was made the Sunni Central Board asked the committee of management of the wakf to submit the annual budget to the Sunni Central Board for approval and also to get the accounts audited by the auditors of the Board It also levied the usual contributions to be made by the wakfs under section 54, Muslim Wakfs Act (XIII of 1936). The management being dissatisfied with these directions and also being of opinion that the contribution asked for by the Board could not come within the purview of the Act instituted

1 (1927) 53 M L J 81 L R 54 I A 338
2 (1947) 2 M L J 208 L R 74 I A 223.
3. A I R 1960 S C. 1309.
4 A I R 1944 Cal 836
5. A I R 1954 All 68.

the suit against the Sunni Central Board of Wakf The Wakf Board invited the Court to dismiss the suit *in limine* on the ground that the statutory notice contemplated by section 53 of the Act was not issued to the Board This objection did not prevail with the trial Court which decreed the suit But on appeal it was upheld by the High Court of Allahabad and the suit was dismissed The decision of the High Court was affirmed by the Supreme Court in *Sirajul Haq* v *S C. Board of Wakf*[1]

Sri Rajah Ayyar argues that both the Allahabad High Court and the Supreme Court rested their decision on the specific words of section 53 which has the additional words " or for any relief in respect of any wakf".

We will do well at this stage to read section 53 of the U P Muslim Wakf Act That section provides ·

> " No suit shall be instituted against a Central Board in respect of any act purporting to be done by such Central Board under colour of this Act or for any relief in respect of any wakf until the expiration of two months next after notice in writing has been delivered to the Secretary, or left at the office of such Central Board, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims and the plaint shall contain a statement that such notice has been so delivered or left "

It is true that in this section there is an additional clause " for any relief in respect of any wakf" But does that make any difference so far as the present suit is concerned, or can it be said either that the Allahabad High Court or the Supreme Court based their judgment on the existence of these additional words ? It is pertinent to note here that the Allahabad High Court has relied more on the analogy of section 80, Civil Procedure Code, than on the existence of this expression Say the learned Judges of the Allahabad High Court in paragraph 20 of the judgment

> " These provisions are almost analogous to the provisions of section 80, Civil Procedure Code. In view of the fact that it has been found that the subject-matter of dispute in this case was wakf property it was necessary for the plaintiffs to serve the statutory notice provided under section 53, Muslim Wakf Act, before the institution of the suit "

Thus it is the analogy obtaining between the two sections that induced the learned Judges to reach this decision So nothing turns upon the absence of those words in section 56

Whatever might have been the doubt that could be entertained in regard to the basis of the judgment of the Allahabad High Court, all doubts will be resolved if reference is made to the judgment of the Supreme Court in *Siraj Ul Haq* v. *Board of Wakf*[1] Gajendragadkar, J., as he then was, in delivering the judgment of the Court, observed .

> " The requirement as to notice applies to suits against a Central Board in respect of their acts as well as to suits for any relief in respect of any wakf "

Thus, the absence of the expression " for any relief in respect of any wakf" does not alter the situation so far as this act is concerned

We cannot agree that no relief is asked for against the Wakf Board, and, in any event, section 56 is attracted to suits of this type

We are unable to share the view sought to be pressed upon us by Sri Rajah Ayyar that the act complained of is not of the Wakf Board It is true that the publication of the list of wakfs in the State is founded upon the report submitted by the Commissioner. But what is attracted in the suit is the publication of the list in the Fort St George Gazette If the wakf was not included in this list the respondents would not in any way have been affected. It is the publication that has given rise to this suit, and, in fact, it is specifically mentioned in the suit that the cause of action had arisen on 24th December, 1958, the date of publication in the Fort St. George Gazette. Therefore it is the act of the Board that is questioned We cannot also ignore the fact that the suit is instituted against the Board and not against the Commissioner and in fact the Commissioner cannot be made a party to the suit.

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1. 1959 S C J. 367.

There can therefore be no doubt that it is the act of the Board in publishing the list including the subject-matter of this litigation that is complained against and that is the basis of the suit For these reasons we uphold the objection of the appellant that the omission to issue the statutory notice has affected the maintainability of the suit.

In the result, the judgments and decrees of the Courts below are set aside and the suits dismissed. We direct the parties to bear their own costs throughout.

R M. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K VEERASWAMI AND MR JUSTICE P. KUNHAMED KUTTI.

V. S Mani ... *Applicant**

v.

Controller of Estate Duty, Madras .. *Respondent.*

Estate Duty Act (XXXIV of 1953), *section* 10—*Gifts—Estate duty—Gifts where donor not entirely excluded—Fixed deposits in bank—Gift by father to son two years before death—Interest on such deposits—Added to the account of father at the direction of son—Principal amount under the gift—If still the property of the deceased for levy of duty*

Words and Phrases—" To the extent "—" Entirety"

A father made a gift of amounts kept in a fixed deposit account to his son and intimated the bank to pay the principal and interest on maturity to his son, by his letter dated 8th June, 1956 On 11th October, 1956, the donee requested the Bank to credit the interest due on the deposits to the current account of his father The fixed deposits matured for payment on 14th November, 1956, and 15th November, 1956 The father died on 5th September, 1958 On the question whether the principal amount on the fixed deposits is liable to estate duty, the Assistant Controller, held computing the period of two years of the gift from the date of the maturity, that the same was not made two years prior to the death and hence liable to duty On appeal the Board of Revenue differing from the Controller that the gift was not made two years prior to the death held however the same was liable to estate duty under section 10 of the Act on the ground that the donor retained the property gifted On a reference at the instance of the accountable person,

Held, that the principal amount is not liable to estate duty in the hands of the donee The interest amount duly credited to the account of the donor at the instance of the donee is properly includible in the principal value of the estate of the deceased

The words " to the extent " occurring in section 10 of the Act brings to tax only that value of the property gifted which is still retained by the donor The section in case of partial gift, so to state, in the context of section 10 charges only the part covered by the non-exclusion and non-retention clauses in the section The word " entirety " in the context refers only to the fractional part, the possession of which has not been taken or assumed by the donee and retained to the exclusion of the donor

Case referred to the High Court by the Central Board of Revenue, Government of India, New Delhi, under section 64 (1) of the Estate Duty Act, 1953, in R.A. No. Mad, 136 of 1959 on its file.

R. Parasaran, for Applicant.

V. Balasubrahmanyan, for Respondent

The Judgment of the Court was delivered by

Veeraswami, J—This reference under section 64 (1) of the Estate Duty Act turns on construction of the words "to the extent" in section 10 of the Act S Vaidyanatha Iyer died on 5th September, 1958 On 8th June, 1956, he addressed the Kumbakonam Bank Ltd , informing it of his intention that the two fixed deposits, one for Rs. 15,000 and the other for Rs 10,000, should be taken by his second son V S. Mani and requesting the bank to pay the principal and interest due on the deposits on maturity to him On 11th October, 1956, V. S Mani advised the bank that the interest due on the two deposits might be credited to the current account of his father, Vaidynatha Iyer. Both the letters were given effect to by the bank as intimated by it on 15th October, 1956 It appears that the fixed deposits matured for payment on 14th and 15th October, 1956 The Assistant Controller rejected the

*Tax Case No 1 of 1964 7th December, 1965.
(Reference No 1 of 1964)

contention of the accountable person that the gift was made *bona fide* more than two years before the death of the deceased and did not attract estate duty in view of the provisions of section 9 This was on the view that the two years should be computed from the date of maturity of the fixed deposits On appeal the Board of Revenue differed and held that the gift was made two years before the death of the deceased But the Board concurred with the Assistant Controller and found that the gift was hit by section 10 and was chargeable to duty. In the circumstances the question referred to us is :

" Whether on the facts and in the circumstances of the case, the entire amount of the two fixed deposits gifted by the deceased more than two years before his death, has been correctly included in the principal value of the estate of the deceased as property deemed to pass on his death under section 10 of the Act "

We are of opinion that the view of the Revenue of this question cannot be accepted For the accountable person it is not disputed that so far as the interest due on the fixed deposits which on the advice of the donee was credited to Vaidyanatha Iyer in his current account it was properly included in the principal value of the estate subject to duty. What is however argued is that the principal due under the two deposits does not attract duty This submission for the accountable person is based on his construction of the words "to the extent" which occur in section 10. It is said that the effect of these words is to limit the levy of duty proportionate to the quantum or extent of the property retained by the donee. On the other hand, for the Revenue it is argued that " to the extent " in the section does not refer to extent or quantum of interest not taken possession of and retained by the donee but has the effect of "if" or "where". If that is the effect to be given to the words "to the extent" there is no difficulty in holding that even though the retention with the donor is only of a part of the property which is the subject-matter of the gift, the entire property will become chargeable to duty. In our opinion, the correct construction is that which is urged for the accountable person.

The words " to the extent" employed in section 10 are not to be found either in the English or Australian Acts relating to estate duty. Though the phraseology of section 10 in the Indian Act would appear to have been substantially borrowed from the English Act, we fail to understand why the Indian Legislature introduced those words in the section unless its intention was to bring to tax only the value of property gifted which is still retained by the donor The section, in case of partial gift, so to state, in the context of section 10, charges only the part covered by the non-exclusion and non-retention clauses in the section To the extent to which the donor retains an interest in the entirety of the property given away by him as gift, there will be *pro tanto* liability to estate duty.

It is strenously urged for the Revenue that if that was the meaning, the words "entire exclusion" will have no sense or content We are of the view that the word "entirety" in the context refers only to the fractional part, the possession of which has not been taken or assumed by the donee and retained to the exclusion of the donor.

Section 6 also uses the words " to the extent ". But in the context of section 40 these words clearly indicate the extent or quantum of interest. There is no reason to think that those very words in section 10 have been used in a different sense. The construction we have placed on the words "to the extent" receives support from *Rash Mohan Chatterjee* v. *Controller of Estate Duty*[1]. The question referred to us is answered in favour of the assessee with costs. Counsel's fee Rs. 250.

V S. *Answered accordingly.*

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1. (1964) 52 I.T R. (E D) 1

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. S. KAILASAM.

Commissioner of Gift-tax, Madras .. *Applicant**

v.

N. S. Getti Chettiar .. *Respondent.*

Gift-tax Act, (XVIII of 1958), *sections* 2 (xxiv), 4 *and* 20.—*Hindu undivided family—Partition—Unequal allotment of shares—Excess allotment to one member—Not a gift exigible to tax—Partition—No element of transfer involved—Not a transaction with another person.*

Words and Phrases—" Gift "—" Transaction "—" Transfer of property "—" Include "—" Without limiting the generality of the foregoing".

On a partition of the Hindu undivided family, consisting of the assessee, the father as the *karta* and his son, of the movable and immovable properties, though the assessee would be entitled to a half share of the properties, yet he took a smaller share and allotting a greater share to his son. On the question whether on the allotment of a larger share to another member, the excess was liable to be treated as a gift exigible to gift-tax, the Appellate Authority and the Tribunal differing from the Officer held that the transaction was not a gift chargeable to tax under the Act. On a reference at the instance of the Department under section 26 of the Act,

Held, that if in a partition between the members of a Hindu undivided family resulting in unequal division and a member is allotted a greater share, the excess is not a gift exigible to gift-tax under the Act.

A partition in a Hindu undivided family does not involve any transfer of property from one to another. The contention of the Revenue that immediately after the severance in status is effected the share of each of the coparceners becomes ascertained and therefter, when he deals with his share in such a manner as to reduce the value of his share and increase the share of another coparcener, it would amount to a transfer amounting to a gift is not supported by any authority.

Where the word defined is declared to " include " so and so, the definition is extensive. Therefore the meaning of the words " transfer of property " is extended to include the transactions in sub-clauses (*a*) to (*d*) of section 2 (xxiv) of the Act. The phrase " without limiting the generality of the foregoing " occurring in section 2 (xxiv) would not have the effect of restricting the extended meaning of the term " transfer of property " including the four sub-clauses. The effect would be that the different clauses, which are included, will not by any implication have the effect of limiting the generality of the words used, and by construction of any or of all the sub-clauses (*a*) to (*d*) it cannot be contended that the general meaning of the words used is restricted.

The word " property " is defined as including any interest in the property. The ingredients of sub-clause (*d*) are that the transactions must be entered into by a person, that it must be with the intention to diminish the value of his own property and that it must also be with the intention to increase the value of the property of another.

The process of division in a Hindu undivided family cannot be termed as a " transaction entered into by any person ". The intention under the clause could only have been to cover cases in which a person was by a transaction diminishing the value of his property in favour of another, who has no right to that property. This conception does not fit in with the percess of division by metes and bounds of joint family property. There is strictly no donor-donee relationship.

The imposition of a tax must be based on the clear and express language of the enactment and not by implication. In the absence of express declaration there can be no presumption that any alteration of law was intended. The words in sub-clauses (*a*) to (*d*) are by no means clear and unambiguous in their intention either to alter the existing law or to impose a tax on a transaction where the partition results in unequal allotment of shares.

Whatever may be the position under the Hindu Law, for the purposes of the Gift-tax Act, the joint family is deemed to continue till there is a partition by metes and bounds and the same recorded by the Officer.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 26 (1) of the Gift-tax Act, 1958 in R.A. No. 599 of 1962-63 (G.T.A. No. 48 of 1961-62 for the Assessment year 1958-59).

V. Balasubrahmanyam, Standing Counsel for Income-tax, for Applicant.

M. Uthamma Reddi for *John & Rao* and *Miss V. Vimala,* for Respondent.

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* T.C. No. 65 of 1963.
(Ref. No. 18 of 1963). 10th December, 1965.

The Judgment of the Court was delivered by

Kailasam, J.—The question for decision referred to us in this case is :

> " Whether there was a gift by N S Getti Chettiar of Rs. 2,47,376 on which he is liable to pay gift-tax ? "

N S Getti Chettiar, the assessee, was the *kartha* of a Hindu undivided family consisting of himself and his son, Govindaraju Chettiar who had six sons. There was a partition of immovable properties by a registered deed executed on 17th January, 1958, and of movable properties by entries in the books on 13th April, 1958. On 29th November, 1958, the claim of the assessee for partition was granted by the department The total value of the joint family properties so divided was Rs 8,51,440 Though the half-share of Getti Chettiar would be Rs 4,25,720, he took only Rs 1,78,343, the balance being allotted to his son and grandsons.

The Gift-tax Officer held that no reasons were advanced by the assessee for allotting a share far in excess of half-share to the other members of the family and that, therefore, there had been a gift within the meaning of the Gift-tax Act, and assessed the tax on a sum of Rs 2,36,377, which was the excess allotment to the other sharers On appeal, the Appellate Assistant Commissioner held that there was no transfer of property in the case of partition when the joint enjoyment came to an end and therefore the transaction did not involve any gift exigible to tax The Income-tax Appellate Tribunal agreed with the view of the Appellate Assistant Commissioner and held that no gift was made by one coparcener to another when a partition took place between the members of a Hindu undivided family On the application of the Commissioner of Gift-tax, Madras, the Income-tax Appellate Tribunal has referred the question of law to this Court for decision under section 26 (1) of the Gift-tax Act

The admitted facts are that the assets of the joint family were worth Rs 8,51,440s Though Getti Chettiar was entitled to a half-share, *viz*, Rs 4,25,720, he took only Rs. 1,78,343 The question is whether the excess amount of Rs 2,36,377 allotted by Getti Chettiar to his son is a gift under the Gift-tax Act and as such exigible to tax.

The contention of the learned Counsel for the Revenue is that, when a partition takes place in a Hindu undivided joint family and there is a division in status, the shares of each of the members are crystallised, and, if by any transaction the value of the share of one person is reduced resulting in an increase of the share of the other person, it amounts to a gift within the meaning of the Gift-tax Act

The word " gift " is defined in the Gift-tax Act, 1958, as follows :—

> " 'Gift' means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be a gift under section 4 "

This definition apart from the gift mentioned in the earlier portion also includes the transfer of property deemed to be a gift under section 4 The extended meaning of the word " gift " by virtue of the deeming clause will be dealt with later. A gift contemplates transfer by one person to another of movable or immovable property without consideration. The person by whom the transfer is made is the donor, and the person to whom the transfer is made is the donee "Donor" means any person, who makes a gift " Donee " means any person, who acquires any property under a gift and, where a gift is made to a trustee for the benefit of another person, includes both the trustee and the beneficiary.

A partition in a joint Hindu family effects a division in status, and every coparcener becomes entitled to a share upon partition The right to survivorship is put to an end and each coparcener becomes entitled to a specific separate share After a division in status a division of the joint family properties by metes and bounds follows The assumption is that every coparcener has some sort of title to the entire family properties and by agreement each of the coparceners relinquishes all his right to the properties other than those that are allotted to him and recognizes the rights of other coparceners to the shares allotted to them respectively Therefore, there is no transfer of any interest passing the title from one, in whom it resides, to another

receiving it without any title As every one of the coparceners has title to the entire joint family properties, there is no transfer involved in a partition The contention of the learned Counsel for the Revenue that immediately after the severance in status is effected the share of each of the coparceners becomes ascertained, and thereafter, when he deals with his share in such a manner as to reduce the value of his share and increases the share of another coparcener, it would amount to a transfer amounting to a gift is not supported by any authority At this stage, as already stated, we are not dealing with the extended meaning of the word " gift " under the Act.

In *Narasimhalu* v *Someswara Rao*[1], it was held that the allotment at a partition of a *Jyeshtabagam* to the eldest brother was no more than giving a larger share than would strictly be due to him and involved no gift by the younger brother or brothers. Dealing with the nature of the partition, the Court held that under a partition arrangement each co-owner gets a specific property in lieu of his rights in all joint properties, that is to say each co-sharer renounces his rights in other common properties in consideration of his getting exclusive right to and possession of specific properties in which other co-sharers renounce their rights The Court further held that the transaction is one of renunciation of mutual rights and does not involve any transfer by one co-sharer of his interest in the properties to the other In *Radhakrishnayya* v *Sarasamma*[2], the question whether partition is transfer was elaborately considered Subba Rao, J , (as he then was) speaking for the Bench referred to the divergent views of the Courts in the following terms :—

> " (1) Partition is a conversion of joint enjoyment into enjoyment in severalty The crucial test of a transfer by a person having a right in favour of a person having no right is not satisfied. There is no conveyance but a transformation of property, an allotment by virtue of his antecedent title as co-sharer
>
> (2) It is a conveyance of a portion of joint right in exchange for a similar right from his co-sharer "

The learned Judge held that the latter view of a partition as a conveyance of a joint right involved an introduction of fiction and was also contrary to the fundamental conception of partition The learned Judge further observed —

> "Partition, therefore, is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty Each one of the sharers had an antecedent title and therefore no conveyance is involved in the processes as a conferment of a new title is not necessary "

In *M K Sremann* v *Commissioner of Income-tax*[3], a Bench of this Court took the same view It held that a partition of joint family property did not constitute a transfer of assets, direct or indirect, within the scope of section 16 (3) (*a*) (iv) of the Income-tax Act The Bench observed

> " Obviously no question of transfer of assets can arise when all that happens is separation in status, though the result of such severance in status is that the property hitherto held by the coparcenary is held thereafter by the separated members as tenants-in-common Subsequent partition between the divided members of the family does not amount either to a transfer of assets from that body of the tenants-in-common to each of such tenants-in-common "

The view as expressed in *Radhakrishnayya* v *Sarasamma*[2], and *M K Sremann* v *Commissioner of Income-tax*[3], was approved by the Supreme Court in *Commissioner of Income-tax, Gujarat* v *Keshavlal Lallubhai Patel*[4]. In *Sahu Madho Das* v *Mukand Ram*[5], Bose, J , stated the position thus at page 10

> " It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary "

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1. (1948) 1 M L J 150 A I R 1948 Mad. 505
2. (1950) 2 M L J 338 I L R (1951) Mad 607.
3. (1961) 41 I T R 297 A I R 1962 Mad 26
4. (1965) 1 S C J 103 (1965) 1 I.T.J. 1 : (1965) 55 I T R 637
5. (1955) 2 M L J. 1 . (1955) S C.J 417 : (1955) 2 S C R 22

In a recent decision of the Supreme Court in *Kalooram Govindram* v *Commissioner of Income-tax*[1], the question arose whether the assessee of a Hindu undivided family is entitled to claim depreciation in respect of the assets of the old Hindu undivided family on the basis of the original cost to the family or on the basis of the valuation at which the assessee took over the assets. In a partition between the members of a Hindu undivided family *G* was declared to be entitled to 10/16th and B to 6/16th share One of the items was a sugar factory and it was sold in auction and knocked down for a sum of Rs 34,00,000 The question that arose was whether *G*'s family was entitled to depreciation of the factory under the Indian Income-tax Act on the amount of Rs 34,00,000 the depreciation not having been allowed for any earlier part. In holding that the depreciation allowance ought to be computed on the basis of the valuation at which *G* took over the assets, Subba Rao, J , who spoke for the majority observed as follows :—

" Coparcenary is a creature of Hindu Law The concept involves 'community of interest, unity of possession and common enjoyment ' Each coparcener's right extends to the whole joint family property Though each one of them has interest in the whole family property, he has no definite share therein Partitioning is the ascertainment of individual shares and it can be brought about by unambiguous declaration of their intention to divide, *i e* , by a conscious alteration of their status Such a declaration brings about division in status At that stage the members of an erstwhile joint family become tenants-in-common The next step is the division by metes and bounds whereunder separate properties are allotted towards the said definite shares of the individuals Whether the said process involves transfer or not within the meaning of the Transfer of Property Act, it certainly confers on a divided member an absolute title to a specified property, whereas before partition he had only some interest in the entire joint family property "

It was contended by the learned Counsel for the Revenue that the Supreme Court has not decided the question whether the process of division by metes and bounds is a transfer or not, and this question was left open. It was not necessary for the Supreme Court in the case to decide the question, but in the decisions of the Supreme Court cited already it has been clearly laid down that the process of division by metes and bounds, whereunder separate properties are allotted towards the definite shares of individuals, is not a transfer of property On a consideration of the authorities cited above, it is clear that the partition by metes and bounds between the divided members of the family subsequent to a division in status, would not amount to a transfer of property

The next question that has to be considered is whether the transaction in question would come within the extended meaning of the word "gift" under the Gift-tax Act. Gift is defined to include the transfer of property deemed to be a gift under section 4 " Transfer of property " is defined in section 2 (xxiv) as follows :—

" 'Transfer of property' means any disposition, conveyance, assignment, settlement, delivery payment or other alienation of property and, without limiting the generality of the foregoing includes—

(*a*) the creation of a trust in property,

(*b*) the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property ,

(*c*) the exercise of a power of appointment of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the donee of the power , and

(*d*) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person "

Learned Counsel for the Revenue submitted that whatever may be the nature of a partition, the transaction, by which the value of the share of a coparcener is reduced and that of another coparcener is increased, would fall within the extended meaning of " transfer of property ' as defined in section 2 (xxiv) Sub-clause (*d*) brings the transaction entered into by any person, by which the value of his property is diminished and that of another person increased, within the meaning of the term "transfer of property" . The contention is that under this extended meaning of the term "transfer of property" a transaction by which a coparcener after division in status relinquishes a portion of his interest in his ascertained share would be a gift. The construction of clause (xxiv) of section 2 is not free from difficulty The

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1. (1965) 2 S C J 416 . (1965) 2 I T J 310 (1965) 57 I T R 335

meaning of the term "transfer of property" is given as disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property It is further stated that the definition will include the transactions mentioned in the four sub-clauses, sub-clauses (*a*) to (*d*), without limiting the generality of the transactions mentioned in clause (xxiv) of section 2 The questions that arise for consideration are whether the word "includes" would have the effect of extending the meaning of the term "transfer of property" and whether the phrase "without limiting the generality of the foregoing" would have the effect of including the transactions, which do not generally fall within the various heads mentioned in the main clause In other words should the phrase "without limiting the generality of the foregoing" mean as "in addition to the generality of the foregoing"? The effect of using the word "includes" in a definitive clause has been considered In Craies on Statute Law (6th Edition) at page 212 it is stated that where the word defined is declared to "include" so and so, the definition is extensive Therefore, the meaning of the term "transfer of property" is extended to include the transactions in the four sub-clauses But the question is whether the phrase "without limiting the generality of the foregoing" would make any difference.

Learned Counsel for the Revenue relied on a decision reported in *Grimwade* v. *Federal Commissioner of Taxation*[1], for the interpretation of this phrase Section 4 of the Gift Duty Assessment Act, 1941-42 is the same as section 2 (xxiv) of the Gift-tax Act The phrase "without limiting the generality of the foregoing" is used in section 4 of the Gift Duty Assessment Act The case cited *Grimwade* v *Federal Commissioner of Taxation*[1], was disposed of on the ground that the assessee did not enter into a transaction constituting disposition of property within the meaning of paragraph (*f*) similar to sub-clause (*d*) of clause (xxiv) of section 2 and therefore there was no gift upon which duty became chargeable The effect of the phrase in question was not considered by the Full Court of Appeal But Williams, J , whose decision was appealed against, at page 208, made the following observations

> "It appears to me that paragraphs (*a*) to (*f*) were included in the definition of disposition of property for the purpose of including in the definition transactions which might otherwise not to be held to fall within the ordinary meaning of a disposition or other alienation of property and that each paragraph is complete in itself"

The learned Judge has not specifically considered the effect of the phrase "without limiting the generality of the foregoing" But both the Courts proceeded on the basis that the effect of the section would be inclusion of paragraphs (*a*) to (*f*) within the definition of disposition of property, which might not have been otherwise included. The phrase "without limiting the generality of the foregoing" would not have the effect of restricting the extended meaning of the term "transfer of property" including sub-clauses (*a*) to (*d*) of clause (xxiv) of section 2 The effect would be that the different clauses, which are included, will not by any implication have the effect of limiting the generality of the words, used, and by a construction of any or of all the sub-clauses (*a*) to (*d*), it cannot be contended that the general meaning of the words used is restricted. The result, in our opinion, is that the extended meaning of the term "transfer of property" by addition of sub-clauses (*a*) to (*d*) is validly given. Having held that sub-clause (*d*) of clause (xxiv) of section 2 is valid and is included within the extended meaning of the term "transfer of property", we will proceed to examine its import.

The word "property" is defined as including any interest in the property, and the contention of the learned Counsel for the Revenue is that a transaction, which would diminish the value of a property, that is a share in the joint family property, and increase the value of the property of another would come within the ambit of this clause The ingredients of this sub-clause (*d*) are (1) that the transactions must be entered into by a person, (2) that it must be with the intention to diminish the value of his own property, and (3) that it must also be with the intention to increase the value of the property of another The effect of the transaction in question is to diminish the value of the property of the assessee and increase the value of the other member

1. 78 Com.L.R. 199.

of the family The intention cannot also be denied But the question is whether the allotment of a greater share in the course of a partition by metes and bounds would be a transaction entered by a person resulting in the diminishing of the value of his own property In *Grimwade* v *Federal Commissioner of Taxation*[1], while considering clause (*f*) of section 4 of Gift Duty Assessment Act, 1941-42 which is similar to sub-clause (*d*) of clause (xxiv) of section 2 of the Gift-tax Act, the purport of the word " entering into transaction" was dealt with In the case cited E M Grimwade voted for a resolution of a company, which had the effect of reducing the value of his shares and increasing the value of the other sharers, who happened to be his sons. Rich, J., after referring to the dictionary meaning of the word ' transaction ", *viz* , " negotiation, dealing between man and man, management, affairs, things managed" observed as follows —

" Whatever may be the precise meaning of the word in section 4 (*f*) it should, in my opinion, be construed as meaning some act, doing, negotiation or dealing by a donor in favour of a donee, whether by direct of indirect method "

Latham, C J., and Webb, J , observed as follows :

" When a shareholder makes up his mind to vote in a particular way and casts his vote accordingly, he cannot be said to be entering into a transaction A transaction by a person must be a transaction with some other person If a preference shar holder in a company voted in favour of reducing the rate of dividend upon preference shares in order to allow the company to pay some dividends to ordinary shareholders, it would be an unreal description of what took place to say that that fact showed that the preference shareholders had entered into a transaction "

The learned Judges pointed out that one could not disregard the proposition that a company was an independent legal entity distinct from its members The purport of the clause, as understood by the learned Judges, is that there should be a dealing by a donor in favour of a donee This conception does not fit in with the process of division by metes and bounds of joint family property. There is strictly no donor-donee relationship All the sharers have some sort of title to the entire property The sharers by acknowledgment and relinquishment become entitled to specific properties In the process each of the sharers relinquishes his right to the other property excepting that allotted to him in return for the other sharers relinquishing their right to the property allotted to him. A division by metes and bounds of a joint family property is different, in that all sharers have some antecedent title to all the properties and there is mutual acknowledgment and relinquishment. The process of division cannot, therefore, be termed as a " transaction entered into by any person" This view is strengthened by the use of the words "his own property" in sub-clause (*d*) If a transaction concerning properties, to which both the parties had title, was intended to be included, it is unnecessary to use the word "own". The intention could only have been to cover cases in which a person was by a transaction diminishing the value of his property in favour of another, who had no right to that property. In this connection it has to be noted that for the purpose of the Gift-tax Act the joint family is deemed to continue until there has been a partition by metes and bounds and recognition by the tax authorities If the joint family continued till the division by metes and bounds was complete, there could not be any transaction by a sharer diminishing the value of his own property We will advert to this aspect again a little later.

In construing a taxing statute, which professes to impose a charge upon a subject, the intention must be shown by clear and unambiguous language A tax should not be imposed without a plain declaration of the Legislature to impose it. It has been held that, if a provision is capable of two alternative meanings, the Courts will prefer the meaning more favourable to the subject If a particular case does not fall within the words of the statute, the words cannot be construed benevolently in favour of the State.It is well established in law that the process of division by metes and bounds is not a transfer of property If it is intended to alter the well-established position of law, a distinct and positive legislative enactment is necessary In the absence of express declaration there can be no presumption that any alteration of law was intended. The words in sub-clause (*d*) of clause (xxiv) of section 2 are by no

1. 78 C.L.R 199.

means clear and unambiguous in their intention either to alter the existing law or to impose a tax on a transaction like the present one, with which we are now concerned

Mr V Balasubrahmanian, learned Counsel for the Revenue, relied on a decision reported in *Commissioner of Gift-tax* v *G Satyanarayanamurthy*[1], where the Andhra Pradesh High Court held that the transaction in question was a transfer of property within the terms of section 2 (xxiv) (*d*) and amounted to a gift as envisaged in section 2 (xii) and section 4 (*a*) of the Gift-tax Act In the case cited the manager of a joint Hindu family threw his self-acquisitions into the common stock. The question arose whether the throwing of these self-acquisitions into the common stock is a transfer so as to attract the provisions of the Gift-tax Act The Court held that by the conversion of the self-acquired property into a joint family property there was a decrease in the value of the property of the manager, while it enhanced the value of the property of the joint family, and that, as the Hindu joint family answered the description of any other person contemplated under the Act, the transaction fell within the purview of sub-clause (*d*) of clause (xxiv) of section 2. This decision is not helpful in deciding the question whether subsequent to a separation in status the process of division by metes and bounds in transfer of property.

Section 4 of the Gift-tax Act includes certain transfers of property, which are deemed to be gifts under section 4 Section 4 (*a*) provides that when a property is transferred for an inadequate consideration, the amount by which the market value of the properties exceeds the value of the consideration is deemed to be a gift Under clause (*b*) of section 4, when a property is transferred for consideration, which has not passed either in full or in part the amount of the consideration, which has not passed, is deemed to be a gift Under clause (*c*) of section 4, when there is a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, the value of the release, discharge, surrender, forfeiture or abandonment, to the extent of which it has not been found to the satisfaction of the Gift-tax Officer to have been *bona fide*, is deemed to be a gift made by the person responsible for the release, discharge, surrender, forfeiture or abandonment Clause (*d*) of section 4 provides that, when a person absolutely entitled to the property causes the same to be vested in himself and any other person jointly without adequate consideration and when such other person makes an appropriation out of, the said property, the amount of the appropriation used for the benefit of the person making the appropriation or for the benefit of any other person shall be deemed to be a gift Clauses (*c*) and (*d*) can have no application Clause (*c*) relates to a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, and the value of such transactions, which is found to the satisfaction of the Gift-tax Officer to be not *bona fide*, shall be deemed to be a gift The transactions as such are not taxable but only to the extent to which it has been found to be not *bona fide* In this case it is not disputed that the partition is *bona fide*, and even if the transaction is considered to be release or abandonment of interest in the property as there is no lack of *bona fides*, the transaction is not liable to tax. The transaction, therefore, will not fall under this clause Clause (*d*) relates to a person, who is absolutely entitled to the property, vesting in himself and another person jointly without adequate consideration and such other person making an appropriation of it. The transaction cannot fall under this clause either.

The transaction cannot also fall under clauses (*a*) and (*b*) without invoking the aid of the extended meaning given to the term "transfer of property" under section 2 (xxiv) (*d*) of the Gift-tax Act Class of transfers contemplated under section 4 (*a*) and (*b*) without invoking the extended definition would comprise transfers otherwise than for an adequate consideration and transfers where consideration has not passed or not intended to pass either in full or in part.

We have already held that sub-clause (*d*) of clause (xxiv) of section 2 would not include the transaction in dispute. Even, if, for arguments sake, it is taken that section

1. (1965) 1 I T J 76 (1965) 1 An.W.R 69 : (1965) 56 I.T.R 353.

2 (xxiv) (*d*) would include the transaction in question, it would require considerable straining of the language to bring it within sub-sections (*a*) and (*b*) of section 4. The word "gift" is defined to include transfer of any property to be a gift under section 4. Thus, an extended meaning is given to the word "gift" and the transactions covered by sub-sections (*a*) to (*d*) of section 4 are also deemed to be gifts. A wider meaning is also given to the term "transfer of property" under section 2 (xxiv) Craises on Statute Law (6th Edition) at page 213 points out

> "An interpretation clause, which extends the meaning of a word, does not take away its ordinary meaning An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable but to enable the word as used in the Act, when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable"

Blackburn, J, in *Lindsay* v. *Cundy*[1], observed :

> "An interpretation clause is a modern innovation and frequently it does a great deal of harm because it gives a non-natural sense to words which are afterwards used in a natural sense without noticing the distinction"

The interpretation clause should be used for the purpose of interpreting the words which are ambiguous or equivocal, and not to disturb the meaning of such as are plain or as to prevent the operation of a word in its primary and obvious sense. To read the term "transfer of property" to include the transaction in question does not appear to be natural Sub-section (*a*) of section 4 deals with transfer of property without adequate consideration, and sub-section (*b*) deals with transfer of property for consideration which is not passed or not intended to pass either in full or in part. Obviously even if the transaction in question is held to be a transfer, it cannot be read into section 4 (*a*) or section 4 (*b*) without straining the language considerably. This fact also supports our view that the transaction in question was not intended to be brought within the ambit of section 2 (xxiv) (*d*)

The intention of enacting section 20 of the Gift-tax Act is to enable the collection of the tax on gifts made by the joint family after the joint family had had ceased to exist The Gift-tax Officer is required to record an order that there had been a partition between the various members in definite portions Until he is so satisfied and a record is made to that effect for the purpose of the Act, the joint family is deemed to continue The fact that the Gift-tax Officer has not made a declaration that the family shall be deemed for the purpose of the Act to continue will not make any difference, for a partition is not recognised, unless it is divided in definite portions among the members and recorded by the officer.

Section 25-A of the Income-tax Act, 1922, is more or less analogous to section 20 of the Gift-tax Act Section 25-A enables the Income-tax Officer to make an enquiry when it is claimed that a partition had taken place in a Hindu family If he is satisfied that the family property had been partitioned among the various members in definite proportions, he shall record an order to that effect Sub-section (3) to section 25-A provides that, when an order has not been passed by the Income-tax Officer regarding partition in a Hindu family under section 25-A (1), such family shall be deemed for the purpose of the Act to continue to be a Hindu undivided family It has been held under section 25-A of the Income-tax Act, that, though a joint family has come to an end in law, if a physical division of the family property though possible, has not been effected and consequently no finding is given under section 25-A (1), the family would be deemed for the purpose of the Income-tax Act to continue to be a joint family and taxed as such Even if there is a total partition and division of properties, when no claim is made before the Income-tax Officer or when a claim is made and no finding regarding partition is made by the officer, the family should be deemed to continue to be a Hindu undivided family The purpose of this section as well as section 20 of the Gift-tax Act is to enable the collection of the tax due from the joint family in spite of the fact that subsequently the joint family ceased to exist The device adopted is to deem the family to continue to be joint in spite of a division in status, until the properties are physically divided and the

1. L R. (1876) 1 Q.B.D. 348 at 358.

officer makes a record as to the fact of partition An attempt was made to distinguish section 20 of the Gift-tax Act from section 25-A of the Income-tax Act on the ground that there is no provision corresponding to section 25-A (3) It was submitted that a declaration by the Gift-tax Officer under section 20 (2) is necessary to continue the Hindu undivided family for the purpose of the Gift-tax Act Though the wording is slightly different, it does not make any difference, for it is the duty of the Gift-tax Officer to record a partition if he is satisfied If no such record is made, merely because the Gift-tax Officer failed to make a declaration under section 20 (2) of the Gift-tax Act, the assessment on the joint family as such cannot be avoided. By a fiction the joint family is continued under both sections, section 25-A of the Income-tax Act and section 20 of the Gift-tax Act, even though there had been a partition, till the family properties are divided and a record is made to that effect It is hardly consistent for the Revenue to contend that, while a partition will not be recognised till the joint family properties are partitioned in definite portions and the fact recorded by an officer, the family should be treated as divided the moment there is severance in status and the transaction by any of the sharers during the process of division by metes and bounds as a transaction by the sharer and not by the family Though section 20 is intended only to cover tax on gifts made by the family in the event of a subsequent partition, provision is made for the officer to satisfy himself and record the fact of a partition after division in definite portions Sub-section (2) enables the Officer to treat the family, even after division in status, as a joint family for the purpose of this Act It could not have been the intention of the Legislature to treat the joint family before division by metes and bounds as divided in different circumstances In our view, whatever may be the position under the Hindu Law, for the purpose of the Gift-tax Act, the joint family is deemed to continue till there is a partition by metes and bounds and the same recorded by the officer. As the joint family continues having a distinct entity, there cannot be any "transaction by a sharer as a person diminishing the value of his own property" We are satisfied that the transaction in question is not a gift liable to pay tax under the Gift-tax Act. We answer the reference in favour of the assessee with costs Counsel's fee Rs. 250.

V. S. *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE T. VENKATADRI.

General Assurance Society, Ltd ... *Appellant**

v

N. A Mohamed Hussain and Another .. *Respondents.*

Motor Vehicles Act (IV of 1939), sections 95 and 96—Insurance company—Insurer of a van—Accident causing injury to an employee of the owner insured—Liability of the insurer to the employee injured—Award by the Motor Accidents Claims Tribunal—How for binding on the insurer—Higher sum based on the Workmen's Compensation Act, not allowable

An employee of the Snuff Factory (P), Ltd , was injured in an accident to the motor van of the owner of the said factory, on the public road the van was insured with the appellant, General Assurance Society Ltd The employee along with the employer claimed compensation before the Motor Accidents Claims Tribunal which resulted in an award

On appeal against the award in respect of the compensation of Rs 4,500 payable to the employee by the insurer the employee cross-appealed claiming a higher amount calculated on the basis of the Workmen's Compensation Act, 1923

Held, An employee of a person who has insured his vehicle, if he is injured in an accident to the vehicle wherein he was travelling, in the course of his employment has the right to claim compensation along with the employer Though the insured employer is liable to pay compensation to the employee under the Workman's Compensation Act, the Insurance company has to indemnify the employer (owner of the vehicle) against the same in spite of the provisions in the policy excluding such a liability

Section 95 of the Motor Vehicles Act specifically states that in order to comply with the requirements of the chapter relating to the insurance of the Motor Vehicles against third parties the policy

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*A A O No 176 of 1964. 16th December, 1965

of insurance must comply with the requirements of the Act Sub-section (2) (*a*) of section 95 enjoins the liability of the insurer to pay compensation in respect of employees carried in the vehicle insured subject to the limits prescribed therein

The Insurance Company has the right to be made a party to defend the claims made to the Tribunal in respect of accidents to the vehicles , but it cannot avoid the liability except by such defences as are catalogued under section 96 (2) of the Motor Vehicles Act Where there are no such defences open the award of the Motor Accidents Claims Tribunal is binding on the insurer

The appellant-insurer is therefore liable to pay compensation not only to the owner of the van but also to the employee—a person entitled to get compensation under the Workmen's Compensation Act—who is injured in an accident arising out of his employment

Having got the relief under the Motor Vehicles Act the injured employee cannot make a claim against the Insurance Company on the basis of computation of damages under the Workmen's Compensation Act His cross-appeal has also to be dismissed

Appeal against the Order of the Court of the Motor Accidents Claims Tribuna (District Judge), Chingleput, dated 31st March, 1964 and made in O.P. No. 99 of 1962.

N. C. Raghavachari and *V. Rangadorai*, for Appellant.

A. Dorairaj, K. Subramaniam and *N Sankaran*, for Respondent.

The Court delivered the following

JUDGMENT —This appeal arises out of an order passed by the Motor Accidents Claims Tribunal (District Judge), Chingleput, awarding compensation in a sum of Rs 4,500 to the first respondent who sustained an injury, in an accident which occurred on 24th December, 1961, while he was returning from Nagore to Madras in the delivery van of the second respondent Snuff Factory (P), Ltd., MSX 6134, driven by one Jayavelu, and which van has been insured with the appellant, M/s. The General Assurance Society, Ltd., Madras, under a comprehensive policy including third party risk.

The General Assurance Society, Ltd., have preferred the appeal, on the grounds that they are not liable to pay compensation to the first respondent, that their obligations rest only with recompensing the insured company for the loss or damage caused to the insured car, that the accident did not occur while the first respondent was in the course of his employment and that the injured person was not a third party as per the provisions of the Motor Vehicles Act They further contend that the injured person being a passenger is not a third party and there is no statutory liability on the part of the Insurance Company to give compensation to the injured person and that the policy itself does not cover risk to the passenger of the car.

In the appeal before me, learned Counsel for the appellant took me through the relevant provisions of the terms of the policy. Section 11 of the terms of the Policy deals with liability to third parties. Clause 1 is as follows :

" Subject to the limits of liability the Society will indemnify the Insured against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of,

(i) death of or bodily injury to any person caused by or arising out of the use... ..of the motor vehicle,

(ii) .. ...

Provided always that

(*a*) . . ..

(*b*) Except so far as is necessary to meet the requirements of section 95 of the Motor Vehicles Act, 1939, the Society shall not be liable in respect of death of or bodily injury to any person in the employment of Insured arising out of and in the course of such employment

(*c*) Except as far as is necessary to meet the requirements of section 95 of the Motor Vehicles Act, 1939, in relation to liability under the Workmen's Compensation Act, 1923, the Society shall not be liable in respect of death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises"

Learned Counsel for the appellant contends that the Insurance Company is not liable to pay compensation, according to the provisions of the Policy, to the injured

person, even assuming that the accident arose out of and in the course of his employment. Further, the injured person is not either a driver or conductor or any person in pursuance of contract of employment travelling in the vehicle at the time of the accident.

It is usual for the insurance companies to insert the abovesaid provisions, that is the customary exclusions under the third party liability, as stated by Batten and Lindsale in their book 'Motor Insurance' (Third Edition) at page 182. Learned Counsel for the appellant has contended that under the provisions of the Policy, the liability of the third party is completely excluded not only under the terms of the contract but also under section 85 (2) of the Motor Vehicles Act The injured person has no claim against the Insurance Company He has to look for his compensation to the employer that is the insured and he has to take appropriate proceedings under the Workmen's Compensation Act. It is further contended that when there is a definite contract between the insured and the Insurance Company to exclude certain persons who are employed under him, then such injured persons cannot claim compensation from the Insurance Company in respect of injuries caused to them There may be some force in the contention urged by learned Counsel for the appellant, still, we have to consider and examine the provisions in the Motor Vehicles Act which provide for the insurance of third parties In this connection, it is useful to refer to the provisions of section 95 of the Act

"(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—

(a) . .

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death of, or bodily injury, to, any person caused by or arising out of the use of the vehicle in a public place .

Provided that a policy shall not be required (i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment, other than a liability arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to any such employee "

Learned Counsel for the first respondent stresses on the words, "other than a liability arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to any such employee". Sub-section (2) (a) of section 95 is as follows :

"Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability insured in respect of any one accident up to the following limits, namely

(a) where the vehicle is a goods vehicle, a limit of twenty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury, to employees (other than the driver) not exceeding six in number, being carried in the vehicle,"

This section has been introduced by the Amending Act C of 1956. The injured person can always get a remedy in the common law to claim compensation for tortious liability. He has also got a further right to claim compensation under the Workmen's Compensation Act In the instant case when the injured man is employed under one who has insured his vehicle and when he sustains an injury in the course of an accident to the vehicle, though he has right to get compensation under the Workmen's Compensation Act, it is not necessary for him to go to the Workmen's Compensation Tribunal, when he had the right to claim compensation along with his employer under the Motor Vehicles Act Though the employer has got a liability under the general law to pay compensation to the injured person, since the employer happens to be the insured as in this case, as per the provisions of the Motor Vehicles Act, the Insurance Company has to indemnify the employer, in-spite of the fact that there are provisions in the Policy to exclude a liability of this kind It has been specifically stated that under section 95 of the Act in order to comply with the requirements of the Chapter relating to insurance of Motor Vehicles against third parties, the policy of insurance must be a policy which should comply with the requirements of the Act. Therefore no useful purpose will be served by

inserting in the Policy the condition that they are not liable to pay compensation to the persons employed who would be entitled to get compensation under the Workmen's Compensation Act In effect, if the employee is injured in an accident arising out of his employment under the employer the Insurance company is liable to pay compensation not only to the owner of the vehicle for the loss or damage but also to pay compensation to the injured person who will be entitled to get compensation under the Motor Vehicles Act I am therefore of opinion that under the provisions of the Motor Vehicles Act, the Insurance Company is liable to pay compensation both to the insured and the injured, of course within the limited liability prescribed under the Act

It is contended, and rightly in my view, by learned Counsel for the first respondent that the appellant is not entitled to question the award of compensation given by the Motor Accidents Claims Tribunal, in view of the recent decision of the Supreme Court in *B I.C Insurance Co.* v *Itber Singh*[1] It is true that section 96 of the Act gives the Insurance Company the right to be made a party to defend the action But the Insurance Company cannot avoid its liability, except by establishing such defences as are catalogued in sub-section (2) In the instant case, I do not think that the appellant could defend on any of the grounds mentioned in section 96 (2) The principle that has been laid down in the Supreme Court decision is that, on the construction of section 96 (2), the Insurance Company, whenever they are made a party in a claim petition, have only the defences enumerated in section 96 (2) and beyond that they cannot question the award of compensation I am, therefore, of opinion that the appellant is liable to pay compensation not only to the owner of the vehicle but also to the employee who is injured in an accident arising out of his employment, the employee being a person who is entitled to get compensation under the Workmen's Compensation Act.

In the result, the appeal is dismissed

The injured employee, the first respondent in the main appeal, has preferred a cross-appeal There appears to be no reason to interfere with the quantum of compensation awarded by the Tribunal The cross-objector has claimed enhanced compensation to the extent of Rs 55,500 on various heads, *viz.*, expenses incurred and liable to be incurred in regard to the injury, pain and suffering inflicted on the victim, loss of time during the cure and permanent injury and consequent pecuniary loss. It is true that the injured person could claim under the Workmen's Compensation Act, under the various heads mentioned in his appeal, as against his employer but not as against the Insurance Company Having got a relief under the Motor Vehicles Act, it is not open to him to claim under the Workmen's Compensation Act. Further, he has sailed with his employer in preferring a claim against the Insurance Company, the liability of which company is limited to the extent prescribed under section 95 (2) (*a*) of the Motor Vehicles Act The cross-appeal is also dismissed. There will be no order as to costs in both the appeal and the cross-appeal.

K G S *Appeal and cross-appeal dismissed.*

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1 (1960) S.C J 44 (1960) 1 An W R (S C) 6 . (1960) 1 M L J (S C) 6 (1960) 1 S.C R. 168.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*Special Original Jurisdiction*)

PRESENT :— MR. JUSTICE VEERASWAMI & MR JUSTICE KUNHAMED KUTTI.

Messrs. R. Chinnaswami Naidu & Sons and Others .. *Petitioners**

v.

The First Income-Tax Officer, Circle I, Coimbatore .. *Respondent.*

Income-tax Act (*XI of* 1922), *sections* 34, 2 (6-A) (*e*)—*Reassessment—Income-tax Officer—Jurisdiction—Writ of* certiorari—*Interpretation of section—Question of law pure and simple—Question of law involving jurisdiction—Distinction—Order of Officer reopening assessment and making additions to chargeable income on an interpretation of section—Appeal against the order pending before the Appellate Authority—No error of jurisdiction*—Certiorari *will not issue*

Constitution of India, (1950), *Article* 226—*Writ of* certiorari—*High Court—Scope of powers—Wide, yet discretionary—Existence of alternative statutory remedies—Bar to the issue of writ—Errors of jurisdiction capable of correction*

The assessee filed the petitions under Article 226 of the Constitution seeking the issue of a writ of *certiorari* to quash the orders of the Income-tax Officer reopening the earlier assessment under section 34 of the Act and making an addition to the chargeable income on the ground that what was stated to be a loan taken by the assessee from a limited company, should be deemed to be dividend within the meaning of section 2 (6-A) (*e*) of the Income-Tax Act An appeal filed by the assessee to the Appellate Assistant Commissioner against the order of the Officer was also then pending On the question whether the writ could issue.

Held, that the High Court in the exercise of its discretion, would decline to issue the writ

While the power of the High Court under Article 226 of the Constitution is discretionary, a certain restraint upon its exercise is called for Where a statute creates a liability and indicates the forum which will determine such liability and sets up a hierarchy of appellate jurisdictions, it is but proper that the scheme of such a statute is not normally or as a matter of course, by passed and interference is made under Article 226 either at the original or at any subsequent stages envisaged in the statutory scheme.

It is true the power is wide enough to clothe the High Courts with the jurisdiction to interfere even in such cases, but in the exercise of their discretion under the Article, the Court should take into consideration the statutory scheme of remedies and decline to interfere unless the alternative remedies are inadequate and to compel a party to resort to them will amount to denial of speedy justice in the circumstances and would mean grave hardship and harassment and waste of time and money

Certiorari normally goes out to correct errors of jurisdiction either the lack of it or excess or irregular exercise of it It also goes out to correct an error apparent on the face of the record, which does not of course, include an error of a factual nature, or violation of the principles of natural justice Broadly speaking, where a question of vires or constitutional validity of a statutory provision or a rule or total lack of jurisdiction of the particular officer, or forum or an obviously patent error arises, the High Court may well be justified in exercising its power under the Article

The jurisdiction to reopen an assessment is conferred under section 34 of the Act on the Income-tax Officer The question of interpretation of section 2 (6-A) (*e*) being entirely within the competence of the Income-tax Officer or the Appellate Assistant Commissioner, that can raise no question of his jurisdiction or irregular exercise of it There is a marked distinction between a question of law pure and simple and a question of law involving jurisdiction

Petitions under Article 226 of the Constitution of India, praying that in the circummstances stated therein and in the affidavits filed with W P. No. 1271 of 1965 on the file of the High Court, the High Court will be pleased to issue Writs of Certiorari calling for the records in G I. No. C-201/61-62, in G. I. No. D-203 (J) (1) and G. I. No. V-207/1 (1)/61-62 respectively on the file of the respondent dated 10-7-1964, 24-9-64 and 10-8-64 respectively and quash the said orders, of assessment for year 1961-62

S. Swaminathan and *K. Ramagopal*, for Petitioner.

V. Balasubrahmanyam, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J—These petitions are to quash the orders of the Income-tax Officer, Circle I, Coimbatore, relating to the assessment year 1961-62 By those orders he re-opened under section 34 of the Income-tax Act, 1922, earlier assessment orders made against each of the assessees, a Hindu undivided family, and included in

* W.P Nos 1271 to 1273 of 1965, 3rd November, 1965.

each case a sum of Rs. 1 lakh to the chargeable income This is on the view that what was stated to be a loan taken by each of the assessees in the sum of Rs 1 lakh from Gopalakrishna Mills Private Limited, should be deemed to be dividend within the meaning of section 2 (6-A) (*e*) of the Act The Income-tax Officer overruled a contention for the assessees that at the time the loans were made, Gopalakrishna Mills Private Limited had no accumulated profits within the meaning of section 2 (6-A) (*e*) and that the development rebate reserve with the company could not be considered as accumulated profits for the purpose of that section The Income-tax Officer accepted the position that but for the development rebate reserve, there was no accumulated profits strictly so called, but was of the view that though the development rebate reserve would not be available for distribution by way of dividends or profits nevertheless, it, in a sense, represented accumulated profits like any other reserve, and the question whether the creation of particular reserve was a statutory necessity or not was irrelevant in considering the substantial nature or character of the development rebate reserve. On that reasoning he further considered that it was not necessary to correlate the loans with any particular reserve or accumulated profits so long as the same accumulated profit was there with the company. The Income-tax Officer took the view because he thought the funds transferred from the development rebate reserve did not *ipso facto* go out of the funds of the company and they were only an appropriation out of the company's profits. There were certain other contentions also put forward before the Income-tax Officer, which he did not accept, but which we do not think it necessary for purposes of these petitions to refer to The assessees filed appeals before the Appellate Assistant Commissioner of Income-tax, Coimbatore, which were actually heard by him on 18th November, 1964 Pending those proceedings they applied for stay of collection which the Income-tax Officer declined to grant. Thereafter, they moved the Inspecting Assistant Commissioner of Income-tax and later the Commissioner of Income-tax, Madras, who gave a certain measure of relief, but not to their complete satisfaction. It was in these circumstances they moved this Court with these petitions under Article 226 of the Constitution

Two main points were taken by the petitioners . (1) levy of tax on the amounts withdrawn by the assessees from the company temporarily was illegal and without jurisdiction, and (2) section 2 (6-A) (*e*) was *ultra vires* the Central Legislature The second point is now concluded by *Navnitlal C Javeri* v *K K Sen, Appellate Assistant Commissioner of Income-tax*[1], in which the Supreme Court upheld the constitutional validity of that statutory provision. It is the first point, therefore, that is sought to be argued before us. For the Revenue the objection is taken that since the assessees have a right of appeal and actually filed appeals, which were heard and orders are yet to be made, this Court, in the exercise of its discretion under Article 226 should, in view of that decline to entertain these petitions Since we have decided to accept this objection we have not heard learned Counsel for the assessees on the first point.

Article 226 of the Constitution is undoubtedly widely worded and does not place any restraint or restriction on the High Court in the exercise of its jurisdiction under the Article. Even the territorial limitation which originally existed has since been removed Though the Article refers to certain kinds of writs including *certiorari*, the power under the Article is not limited to grant of writs analogous to Crown writs in English jurisdiction. The power under the Article extends to the High Court giving any direction, orders or writs for the purpose of enforcement of fundamental rights or for any other purpose Wide as these powers are, no question of maintainability of any petition, which is filed under that Article, can ever arise. The powers are, however, discretionary in character, so that in particular cases, no question of legality or lawfulness of the exercise of the jurisdiction can properly arise, but the question would be whether, in the particular circumstances, the Court should exercise its discretion and invoke its powers. In the nature of things that consideration will have to be applied in the context of the circumstances in each case If the Court feels that the circumstances and exigencies of the case taken as a whole require that the Court should exercise its power, it will do so.

1. (1965) 2 I.T.J 1 . (1965) 2 Comp L J 1 : (1965) 2 S.C J 160.

Certiorari normally goes out to correct errors of jurisdiction, either the lack of it or excess or irregular exercise of it It also goes out to correct an error apparent on the face of the record, which does not, of course, include an error of a factual nature, or violation of the principles of natural justice The English Courts in issuing prerogative writs, particularly *certiorari*, decline to exercise that jurisdiction where an alternative remedy exists which a party may well resort to But, under Article 226, strictly that limitation may not be applicable as the jurisdiction of High Courts to issue directions is entirely based on the language of the Article. Nevertheless, some of the principles applicable to English writs are borne in mind in giving directions under the Article. Existence of an alternative remedy, which is adequate or otherwise, may not, however, always stand in the way of this Court exercising its jurisdiction if other considerations outweigh But, normally speaking, existence of an alternative remedy is a strong dissuading factor when powers under Article 226 are invoked. Where a right of appeal is given by a statute from an order, of which a party may feel aggrieved, the question for consideration will be whether the statutory mode of redress should be by-passed, and if so, on what grounds ? On that matter, decisions of Courts have not been uniform and that with respect is what is to be expected because the Court in each case is concerned with the facts before them and the compelling or justifiable circumstances with reference to which the powers under the Article are exercised. Broadly speaking, where a question of vires or constitutional validity of a statutory provision or a rule or total lack of jurisdiction of the particular officer or forum or an obviously patent error arises, the Court, in our opinion, may well be justified in exercising its power under the Article. That is because in the first of these cases a decision on vires or constitutionality will not be within the competence of the officer or forum other than the superior Courts, and in the second instance, it will be totally futile for a forum without jurisdiction to proceed in the matter involving harassment to the parties and waste of official and private time Errors of jurisdiction may also come within the purview of the second instance The last instance justifies interference notwithstanding an alternative remedy, for, the error may be so patent as in the case of, for example, two and two being added as five In such cases, it is apparent that not to interfere on ground of existence of an alternative remedy may cause gross injustice or great hardship especially when the Court may feel that the party should get relief at the earliest possible moment. *Shivaji & Co* v. *Joint Commercial Tax Officer*[1], falls under the last category.

Learned Counsel for the petitioners in support of his contention that we should entertain the petitions under Article 226 invited our attention to *Calcutta Discount Co, Ltd* v. *Income-tax Officer*[2], *Bhopal Sugar Industries, Ltd* v *D P Dube, (No. 2)*[3] *Shivaram Poddar* v. *Income-tax Officer*[4], *Santamal Pittambar Prasad* v *Income-tax Officer*[5], and *Transport Co (P), Ltd* v. *Second Income-tax Officer*[6] On the other hand for the Revenue, reference was made to *Rex* v. *Inspector of Taxes and Commissioner of Income-tax*[7], *C A. Abraham* v. *Income-tax Officer*[8], *Thansingh Nathmal* v *Superintendent of Taxes*[9], *Lalji Haridas* v. *R. H Bhatt*[10], *Sales Tax Officer* v *Shivaratan G. Mohatta*[11], and *Madhya Pradesh Industries Ltd* v. *Income-tax Officer*[12]. We do not think it necessary to deal with all these decisions. It will suffice if we refer to the last three decisions which also happen to be the latest

Lalji Haridas v *R H Bhatt*[10], is a case where, before making an order of assessment notice was issued against the assessee under section 46 (1) (*a*) of the Saurashtra Income-tax Ordinance, 1949, which corresponds to section 34 (1) (*a*) of the Indian Income-tax Act. The assessee made a return stating that the amounts in question there did not represent his income at all The assessee preferred an appeal, with

1 (1965) 16 S T C 769
2 (1963) 1 S C J 741. (1961) 41 I T R 191 (1961) 2 S C R 241.
3 (1963) 14 S T C 410
4 (1964) 1 I T J 476 (1964) 1 S C J 434.
5 (1963) 47 I T R 562
6 (1964) 51 I T R 82
7. 8 T C 327.
8 (1961) 1 An W R (S C) 183 (1961) 1 S C J 673 (1961) 1 M L J (S C) 183 · (1961) 2 S C R 765
9 (1964) 15 S T C 468 . (1964) S C R 654
10 (1965) 55 I T R 415, 418
11 (1965) 16 S T C 599 A I R 1966 S C 142
12 (1965) 57 I T R 637.

the result that the matter was remitted to the Income-tax Officer Thereafter the assessee was required to appear before the Income-tax Officer and produce his evidence. Instead of complying with that requisition, the assessee moved the High Court of Gujarat for a writ, while at the same time he also preferred an appeal from the remand order to the Income-tax Appellate Tribunal. The writ petition was dismissed summarily and it was against that order the assessee by Special Leave appealed to the Supreme Court. One of the contentions for the assessee was that the notice issued to the assessee under section 34 (1) (*a*) was barred by time, and was, therefore, invalid Dealing with the contention, the Supreme Court observed :

"We did not allow Mr Pathak to develop this point, because we took the view that a plea of this kind must ordinarily be taken before respondent No 1 himself The jurisdiction conferred on the High Court under Article 226 is not intended to supersede the jurisdiction and authority of the Income-tax Officers to deal with the merits of all the contentions that the assessees may raise before them, and so it would be entirely inappropriate to permit an assessee to move the High Court under Article 226 and contend that a notice issued against him is barred by time That is a matter which the Income-tax authorities must consider on the merits in the light of the relevant evidence"

In *Sales Tax Officer* v *Shiv Ratan G Mohatta*[1], again the Supreme Court had occasion to consider the question as to how far the High Court should interfere under Article 226 In that case, a firm claimed that it was not liable to be assessed to sales tax in respect of a certain turnover and contended that it was not a dealer within section 2 (*f*) of the Rajasthan Sales Tax Act A further contention for the assessee was that the sales were in the course of import within Article 286 (1) (*b*) of the Constitution The Sales Tax Officer rejected the first contention, but in his order there was no discussion on the other point based on Article 286 (1) (*b*) The assessee then filed a petition under Article 226 and reiterated the two grounds The State raised an objection to the maintainability of the petition on the ground that the petitioner should have availed himself of the alternative remedy of appeal provided under the Rajasthan Sales Tax Act. The High Court did not accept this objection, because, as it thought, the contention of the petitioner was that in view of Article 286 (1) (*b*) of the Constitution, the Sales Tax Officer had no jurisdiction to assess the petitioner to pay sales tax on the sale of goods in the course of import into the territory of India. The High Court proceeded to deal with the merits of the case and came to the conclusion that the assessee was a dealer and that the sales were also in the course of import In the circumstances, the State with a certificate of fitness from the High Court filed the appeal before the Supreme Court There, on behalf of the State two points were raised, one of which was that on the facts of that case the High Court should have refused to entertain that petition The Supreme Court accepted this ground and held :

"We are of the opinion that the High Court should have declined to entertain the petition No exceptional circumstances exist in this case to warrant the exercise of the extraordinary jurisdiction under Article 226 It was not the object of Article 226 to convert High Courts into original or appellate assessing authorities whenever an assessee chose to attack an assessment order on the ground that a sale was made in the course of import and therefore exempt from tax It was urged on behalf of the assessee that they would have had to deposit sales-tax, while filing an appeal. Even if this is so, does this mean that in every case in which the assessee has to deposit sales tax, he can by-pass the remedies provided by the Sales Tax Act ? Surely not There must be something more in a case to warrant the entertainment of a petition under Article 226, something going to the root of the jurisdiction of the Sales Tax Officer, something to show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act."

Madhya Pradesh Industries Ltd v *Income-tax Officer*[2], was concerned with a petition for a writ of prohibition restraining the Income-tax Officer from taking any action pursuant to a notice issued under section 34 of the Income-tax Act The contention for the assessee was that the notice was without jurisdiction and the exercise of the power under that section by the Income-tax Officer was for a colourable purpose The Bombay High Court (Nagpur Bench) rejected the petition *in limine* and the question before the Supreme Court on appeal was whether the High Court acted not properly in refusing to investigate the ground raised by the assessee In dealing with that question, the Supreme Court observed thus :

"Jurisdiction to issue prerogative writs is designed to invest the High Court with authority to superintend the exercise of Governmental or other powers by tribunals, authorities, bodies, or persons.

1. (1965) 16 S.T C. 599 A.I.R. 1966 S C. 142 2 (1965) 57 I T.R. 637, 641.

it is intended to be exercised in cases where a person has a right and that right is infringed by a tribunal, authority, body or person acting without or in excess of jurisdiction or in violation of principles of natural justice, or where it refuses to exercise jurisdiction vested in it by law, or even in cases, where there is an error apparent on the face of the record of a quasi-judicial authority and the act, omission or error results in grave injustice The jurisdiction is discretionary and the High Court is not bound to issue a writ merely because it is lawful to do so It is also not intended thereby to supersede the authority and jurisdiction conferred upon the taxing authorities who are invested with power to deal with the merits of the contentions raised before them *Lalji Haridas* v *R H Bhatt*[1]; The High Court must in each case consider, whether the act or omission complained of has resulted or is likely to result in grave injustice, and whether the party approaching it has another adequate remedy which is equally efficacious, whether he has approached the Court without acquiescence, and without undue delay, whether the problem posed raises complicated questions of disputed facts which it would be inappropriate for the High Court to determine, whether the aggrieved party has been guilty of misrepresentation or suppression of material facts, and whether notwithstanding the apparent breach it would be inequitable to grant relief"

It is clear, having regard to these three decisions as well as the other cases, that while the power under Article 226 is discretionary, a certain restraint upon its exercise will be called for. The very wide amplitude of the power itself justifies such a restraint and the power could be exercised only in proper cases. Where a statute creates a liability and indicates the forum which will determine such liability and sets up a hierarchy of appellate jurisdictions, it is but proper that the scheme of such a statute is not normally or as a matter of course, by-passed and interference is made under Article 226 either at the original or at any subsequent stages envisaged in the statutory scheme. It is true, the power is wide enough to clothe the High Courts with the jurisdiction to interfere even in such cases, but in the exercise of their discretion under the Article, the Court should, in our opinion, take into consideration the statutory scheme of remedies and decline to interfere unless the alternative remedies are inadequate and to compel a party to resort to them will amount to denial of speedy justice in the circumstances and would mean grave hardship and harassment and waste of time and money.

In this case, no question of jurisdiction arises. Learned Counsel for the assessees argued that if on a wrong interpretation of section 2 (6-A) (*e*) the Income-tax Officer charged them to tax, he would be acting without jurisdiction We are unable to accept this contention There is a marked distinction between a question of law pure and simple and a question of law involving jurisdiction. The jurisdiction to reopen an assessment is conferred under section 34 of the Income-tax Act It is not the contention for the petitioners that the Income-tax Officer is not competent in this case to act under that section. The Income-tax Officer having jurisdiction is, therefore, also competent to interpret the particular section, and it cannot be said that merely because the petitioners consider that he has placed a wrong interpretation on that section, therefore, the Officer acted without jurisdiction or exercised his jurisdiction wrongly. The learned Chief Justice in *Rex* v *Inspector of Taxes and Commissioners of Income-tax*[2], observed :

"Mr Montgomery concedes that the question whether the deduction is or is not authorised by the Act is a question within the jurisdiction of the Surveyor to determine In that part of the argument Mr Montgomery appeared to say I do not know if he seriously meant it that, if the Surveyor decided the question correctly, the matter was within his jurisdiction, but if he decided it incorrectly the matter was not within his jurisdiction If that be indeed the argument, it appears to me to confuse two things , an erroneous decision within the jurisdiction and a usurpation of a jurisdiction which does not exist I think it is a fact that the question which had to be determined here was a question at the outset within the jurisdiction of the Surveyor, and if there is exception taken to the additional first assessment which he has accordingly made, there is a clear right of appeal under the Act, and that right of appeal is at this present moment being pursued by the applicants in this case I think, therefore, that the application for the writ of prohibition manifestly fails"

The question of interpretation of section 2 (6-*A*) (*e*) being entirely within the competence of the Income-tax Officer or the Appellate Assistant Commissioner, that can raise no question of his jurisdiction or irregular exercise of it. There is no question of *vires* of the section arising because, as we said, *Navnitlal C. Javeri* v. *K K. Sen, Appellate Assistant Commissioner of Income-tax*[3], has upheld the validity of

1 (1965) 55 I T R 415
2. 8 T C. 327 at 329.
3 (1965) 2 I T J 1 (1965) 2 Comp. L J 1 (1965) 2 S.C J. 160.

the section. It is not contended for the assessees that there is any infraction of the principles of natural justice As a matter of fact, the assessees availed themselves of the alternative remedy, have filed appeals, which now have been heard, and orders thereon reserved. We find no exceptional justifiable reasons to persuade us to by-pass the statutory remedies. In view of these circumstances, as we said, we accept the contention for the Revenue that we must leave the assessees to the remedies provided under the Act. These remedies include eventually a Reference to this Court under section 66 of the Act.

The petitions are dismissed with costs Counsel's fee Rs. 250, one set

Learned Counsel for the petitioners says that it would be desirable that the appeals pending before the Appellate Assistant Commissioner are disposed of at an early date. We think so. Learned Counsel for the Revenue undertakes that he will communicate with the appellate authority, so that it may dispose of the appeals within two months from to day.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

Corborandum Univeral Ltd. . *Petitioners.**

v.

Union of India, by the Secretary, Central Board of Direct Taxes .. *Respondent.*

Income-tax Act (XLIII of 1961), section 99 (1) (iv), Fifth Schedule —Super-tax—New industry—Income not chargeable to super-tax—Assessee-company engaged in an industry for manufacture of articles specified in the Fifth Schedule—Exemption to dividend income—Engaged in specified industry—Satisfaction of the Central Government alone prescribed—Application to Central Board of Revenue for obtaining satisfaction and rejection by the Board—Writ of mandamus *directed against the Central Government—Not sustainable—Hierarchy of authorities under the Act*

Constitution of India (1950), Article 226 —Writ of mandamus*—High Court—Powers—Only to direct the proper authority vested with the powers to exercise the power*

The petitioners, a public limited company incorporated in 1954, engaged in the manufacture of grinding wheels and abrasives, being the industrial machinery specified in sub-clause (iii) of clause C of Part A of the Fifth Schedule to the Income-tax Act of 1961, claimed that the profits in its manufacture satisfied the conditions prescribed in Fifth Schedule to the Act and therefore any dividend distributed by the petitioners to its corporate shareholders would be exempt from super-tax in the assessments of the corporate shareholders under clause (iv) of sub-section (1) of section 99 of the Act of 1961 A pre-requisite for exemption of such super-tax would be the satisfaction of the Central Government that the petitioners are wholly or mainly engaged in an industry falling within the scope of the Act The petitioners made an application to the Central Board of Revenue for that purpose On the rejection of that application, the petitioners applied to the High Court under Article 226 of the Constitution, for a rule of *mandamus* directing the Union of India to issue such a recognition.

Held, that the petition has to be rejected as the petitioners did not file the necessary application under the Act to the Central Government The satisfaction contemplated under the Act is that of the Central Government.

When a power is entrusted by a statute to a named authority and the exercise of it is invoked by a concerned person and there is an improper refusal to exercise the power, then of course, in such premises, a *mandamus* may well issue under Article 226 of the Constitution, directing the authority to exercise that power.

The Central Board of Revenue reconstituted as the Central Board of Direct Taxes under the Central Board of Revenue Act, 1963, cannot be considered as the Central Government for the purposes of the Fifth Schedule to the Act

The Central Board of Revenue Act of 1963 itself makes the distinction between the Central Government and the Central Board of Direct Taxes The Income-tax Act also clearly indicates the frame-work of hierarchy of officers with the Income-tax Officer at the bottom and the Central Board of Revenue and now the Central Board of Direct Taxes at the top The Fifth Schedule clearly mentions the Central Government as the authority to be satisfied in the matter of issuing a certificate and not any other authority

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* W P No 2061 of 1965. 1st December, 1965

The power of the High Court in an application under Article 226 of the Constitution will not extend to direct the Central Government to issue the certificate The High Court will only direct the authority vested with the power to exercise that power and decide according to the merits

In the instant case, as the application under the Act was made to the Board and not to the Central Government, the High Court would not be justified in issuing a rule to the Central Government

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* and direct the respondent herein to issue a recognition that the Central Government is satisfied that petitioners are engaged in the manufacture of one or more of the articles, specified in Part A of the Fifth Schedule to the Income-tax Act, 1961.

R. Venkataram, for Petitioner.

V Balasubrahmanyam, Standing Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J—This petition is for a rule of *mandamus* directing the respondent, Union of India, represented by the Ministry of Finance, to issue a recognition that the Central Government is satisfied that the petitioners are engaged in the manufacture of one or more of the articles specified in Part A of the Fifth Schedule to the Income-tax Act, 1961 The petitioners are a public limited company incorporated in 1954 and are said to be engaged during the relevant time in the manufacture of grinding wheels and abrasives, being the industrial machinery specified in sub-clause (*iii*) of clause C of Part A of the Fifth Schedule to the Income-tax Act The petitioners, as they aver, are assessed to income-tax by the First Income-tax Officer, City Circle, for 1960-61 and 1961-62, and in the course of these assessments they claimed that their profits in the manufacture of grinding wheels, were exempt from income-tax under section 15-C of the Indian Income-tax Act, 1922 This contention, according to the petitioners, were accepted, and exemption granted under that provision After the coming into force of the new Act with effect from 1st April, 1962, which would have effect on the petitioners' assessments for 1962-63, the petitioners claimed that the profits in the manufacture of grinding wheels satisfied the condition prescribed in the Fifth Schedule to the Act and therefore any dividend distributed by petitioners to its corporate shareholders would be exempt from super-tax in the assessments of the corporate shareholders under clause (*iv*) of sub-section (1) of section 99 of the Income-tax Act, 1961. Under the relevant statutory provisions a pre-requisite for exemption of such super-tax would be the satisfaction of the Central Government that the petitioners are wholly or mainly engaged in an industry for the manufacture or production of one or more of the articles specified in any of the items in Part A of the Fifth Schedule They, therefore, made an application on 18th April, 1963 to the Central Board of Revenue for recognition as a company engaged in the manufacture of bonded abrasives, which, we are told, is a comprehensive expression to include grinding wheels and other articles of a similar nature produced by the same process After prolonged delay and calling for particulars more than once at various levels, the Under-Secretary to the Central Board of Direct Taxes, by a communication dated 4th March, 1964, intimated the petitioners with reference to their application that the Board of Revenue had considered the matter, but it regretted that the request regarding exemption contemplated under the Fifth Schedule read with section 99 (*i*) (*iv*) of the Income-tax Act, 1961 could not be acceded to. There was a further communication on 14th May, 1964 from the Secretary to the Central Board of Direct Taxes to the petitioners to the effect that if the other condition in sub-clause (2) of rule 1 of the Fifth Schedule was not fulfilled which would disentitle the shareholders to the claim for exemption on that ground, alone, the question of the Central Government satisfying itself about the condition in sub-clause (1) of the rule did not arise It is in these circumstances the petitioners have approached this Court for a direction as aforesaid

On the view we take, we think it unnecessary to go into the merits of the petitioners' claim for a certificate from the Central Government The application of the petitioners for a certificate was made not to the Central Government, but to the Central Board of Revenue as it figured then Section 99 (1) (*iv*) of the Income-tax Act, 1961, reads :

" (1) Super-tax shall not be payable by an assessee in respect of the following amounts which are included in his total income (iv) if the assessee is a company, any dividend received by it, from an Indian Company, subject to the provisions contained in the Fifth Schedule "

Rule 1, clause (*a*) (1) in the Fifth Schedule provides that super-tax shall not be payable in respect of any dividend which is assessable for the assessment year commencing on the last day of April, 1962, and for the subsequent assessment years and which is declared by an Indian company formed and registered after 31st March, 1952 and before 1st April, 1967 where the Central Government is satisfied that the Indian company is wholly or mainly engaged in an industry for the manufacture or production of any one or more of the articles specified in any of the items in Part A of this Schedule. In Part A, section 6-C item (*iii*) relates to grinding wheels and abrasives It may be clear from these provisions that the satisfaction contemplated by rule 1 (*a*) (1) of this Schedule is that of the Central Government But no application was made to the Central Government for a certificate under that provision. When a power is entrusted by a statute to a named authority and the exercise of it is invoked by a person concerned and there is an improper refusal to exercise the power, then, of course, in such premises, a *mandamus* may well issue under Article 226 of the Constitution directing the authority to exercise the power But, for doing it, it is a requisite that the applicant must in the first instance approach the authority with a request to invoke the power, and without that, there would be no occasion for the Court to consider that the authority has refused to exercise or exercised the power improperly, which is vested in it Admittedly, here, there was no application to the Central Government making such a request

Mr. Venkataraman for the petitioners, however, contended that the Central Board of Revenue which was reconstituted as the Central Board of Direct Taxes under the Central Board of Revenue Act, 1963 is but an arm of the Government and it would be proper to say that it is the Central Government itself He relies on the fact that the Board is manned by some of the officials who belong to the Ministry of Finance. We have no hesitation in rejecting this contention The Central Board of Revenue Act itself makes a distinction between the Central Government and the Central Board of Direct Taxes. For instance, section 3 says that the Board shall, subject to the control of the Central Government, exercise its powers and duties entrusted to it by the Central Government or by or under any law The Income-tax Act itself clearly indicates the framework of the hierarchy of officers with the Income-tax Officer at the bottom and the Central Board of Revenue and now the Central Board of Direct Taxes at the top. The Fifth Schedule which we referred to clearly mentions the Central Government as the authority to be satisfied in the matter of issuing a certificate and not any other authority In such circumstances, we are unable to accept the petitioners' contention that the Central Board of Direct Taxes should for the purposes of the Fifth Schedule be considered as the Central Government

It may be that when an application was made under the Schedule to the Central Board of Revenue as it stood then, they could well have transmitted it to the proper authority for disposal, though they might not be obliged to do so That would have tended to the convenience of everybody and would have saved a lot of time and perhaps needless expenditure and futile effort But the point remains that so long as the application was not made to the Central Government, we would not be justified in issuing a rule to the Central Government

From what we have said so far, it is obvious that we have not dealt with the merits on which the Central Government would have to be satisfied The form in which the prayer is couched in the petition pre-supposes that this Court under Article 226 of the Constitution will itself have the power to direct the Central Government to issue a certificate Though it is not necessary to consider this point, at this stage, we may indicate that the power of this Court will not extend that far All that this Court can do is, as we indicated at the outset, where the authority vested with a power, improperly refused to exercise it, to call upon that authority by a rule of *mandamus* to exercise that power and decide according to the merits. It is represented

to us for the petitioners that in view of the considerable lapse of time and the urgency of the matter, any application to the Central Government is likely to be delayed in its disposal We think it proper, in the circumstances of this case, to suggest that if and when an application is made by the petitioners, the Central Government may dispose it of on its merits within at least two months of its receipt.

The petition is dismissed, but in the circumstances with no costs.

V S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN

Ramaswami Pillai ... *Petitioner**

v.

Subramania Pillai by power-of-attorney agent Karuppanna Pillai and another . *Respondents.*

Partition Act (IV of 1893), section 4—Words " undivided family " and " sues for partition " in the section —Meaning of—Suit by a member of family for partition—Stranger-transferee of a part of a dwelling house added as defendant claiming his share—A member of family if can claim to purchase stranger-transferee's share in such suit.

The words " undivided family " in section 4 of the Partition Act has been held by a series of decisions to mean, simply a family, which has not divided the dwelling house by metes and bounds A Hindu joint family divided in status will still be an undivided family *qua* dwelling house for the purposes of the Partition Act, if there has been no division of the dwelling house by metes and bounds.

A ssharer in an undivided joint family can, under section 4 of the Partition Act, claim to buy out a stranger-transferee of a share in a family dwelling house, in a suit for partition though such a suit is not instituted by the stranger-transferee himself but only by a member of the family, provided in such a suit the stranger-transferee seeks relief in recognition of his rights The contention that when a suit for partition is not filed by the stranger-transferee a sharer in the family has no *locus standi* to apply under section 4 of the Partition Act for buying out the transferee is not tenable. While the words " such transferee sues for partition " in section 4 does involve the idea of some action by a transferee to secure a partition, it does not necessarily mean that the transferee himself must institute a suit for partition The word " sues " is not just and only the equivalent of " brings a suit " It conveys also something more , any pleading or petitioning or application for partition and allotment of his share would be covered by the words " sues for partition " Thus even though the stranger-transferee might not have himself instituted the suit for partition, if in a suit for partition wherein he is made a party-defendant, he asserts and applies for his share and seeks relief from Court in recognition of his rights, it could properly be stated that he " sues for partition " In so construing his act, there will be no undue extension of the meaning of the word or any strained construction of the language.

The provisions of section 4 of the Partition Act are just complementary to the second part of section 44 of the Transfer of Property Act and there is a body of judicial opinion favouring a liberal construction in such a way as would promote and fulfil the object of the Partition Act which is to preserve the integrity of a family dwelling house and enable the members of the family to keep it for themselves as far as possible

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Turaiyur, dated 30th April, 1963 and made in I.A No 66 of 1963 in O.S No. 125 of 1959.

K Parasaran, for Petitioner.

S Venkatarama Iyer and *V. Krishnan*, for Respondents.

The Court delivered the following

JUDGMENT.—This revision raises the question as to the scope of the jurisdiction of the Court under section 4 of the Partition Act (IV of 1893):

"Whether a sharer can claim to buy out a stranger-transferee of a share in a family dwelling house, in a suit for partition instituted not by the stranger-transferee but by a member of the family?"

The facts of the case and the proceedings that have led to the controversy may be briefly set out The revision petitioner is the 3rd defendant in a suit for partition of three items of house properties. One Pancha Pilai and the 3rd defendant in the suit were brothers. The first defendant is the widow of Pancha Pillai and the second defendant, their son. The 4th defendant is a purchaser from the 2nd defendant

* C R P No 1204 of 1963. 16th December, 1965

of the western half-share in item (3) of the suit properties, a family dwelling house, under a registered sale deed Exhibit B-3 dated 12th November, 1956. There is some evidence that the two brothers attempted a division of the properties without reference to their mother Deivanai Ammal and she thereupon filed the suit O S. No. 125 of 1959 on the file of the District Munsif, Turaiyur, and it is out of that the present revision arises. Deivanai Ammal, mother, claimed one-third share in the suit properties A preliminary decree was passed on 1st March, 1960, for partition of plaintiff's one-third share and there was a direction in the decree that as far as possible, the western half in item 3 purchased by the 4th defendant may be allotted to the vendor's share. Subsequent to the preliminary decree, the plaintiff executed a settlement deed in respect of her one-third share in the suit properties in favour of the 3rd defendant's wife. Before any further proceedings were taken in the suit, she died. It is in these circumstances that the 4th defendant filed I.A. No. 703 of 1962 in the suit for a final decree for partition in terms of the preliminary decree, claiming equitable allotment of the western half of item 3 to him He brought on record the settlee from the original plaintiff as a supplemental second plaintiff in the suit and a party respondent in his application for final decree In his counter to this application, the 3rd defendant *inter alia* maintained that under the provisions of the Partition Act, the application was not maintainable and that himself and his wife were residing in the dwelling house in the western portion. Similar objections were filed by the supplemental second plaintiff as respondent She had no objection to be impleaded as a party to the proceedings, but she contended that the claim was opposed to the principles of the Partition Act, the house being a residential one and the applicant a stranger to the family. Opposing the claim of the 4th defendant to a share in the property, the 3rd defendant, the revision petitioner, took out an independent application, I A. No 66 of 1963 under section 4 of the Partition Act, claiming for the valuation of the one-third share of the 4th defendant in the western moiety of the 3rd item and sale of the share to him and for necessary directions in that behalf. His wife as the 2nd plaintiff joined in that application. On this application, the learned District Munsif held that, as it was clear from the evidence that there was division in status in the family, there was no undivided family and the first condition for the application of section 4 of the Partition Act was not satisfied. Proceeding he held that as the suit for partition was not filed by the transferee-4th defendant, a sharer in the family had no *locus standi* to apply under section 4 of the Partition Act for buying out the transferee. In deciding this way, the learned District Munsif purports to follow a decision of this Court in *Ramayya* v. *Venkata Subba Rao*[1], as one on all fours to the facts of this case. In view of findings in I.A. No. 66 of 1963 the learned District Munsif held that the transferee would be entitled to equitable allotment claimed by him in his application I A No. 703 of 1962 for final decree and directed partition accordingly. Hence this revision by the 3rd defendant.

Section 4, sub-section (1) of the Partition Act with which we are concerned reads thus :

> " Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family, and such transferee sues for partition, the Court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder, and may give all necessary and proper directions in that behalf "

The first finding of the learned District Munsif that there is no undivided family, for section 4 of the Partition Act to apply, does not present any difficulty as 'undivided family' in the section has been held by a series of decisions to mean, simply a family, which has not divided the dwelling house by metes and bounds. A Hindu joint family divided in status will still be an undivided family *qua* dwelling house, if there has been no division of the dwelling house by metes and bounds for the purposes of the Act. The only finding in this case is that the family was divided in status. At any rate, a preliminary decree has been passed for the division of the

1 (1949) 2 M L J 639

house and on the basis of the preliminary decree, the several sharers had not divided the same and partitioned it among themselves

The real difficulty is in interpreting one of the conditions for the applicability of section 4, the clause " and such transferee sues for partition." The argument on behalf of the transferee is that for the sharer in the family getting the option of buying out a stranger-transferee, the transferee himself must have instituted the suit for paritition While the suit has been filed not by the transferee, but by a member of the family, it is contended that section 4 of the Partition Act has no application. The learned Counsel for the contesting respondent submits that as the application of section 4 of the Partition Act involves a statutory interference with the legal rights of a transferee, it should be strictly construed so as to limit such interpretation. Reference is made in this connection to *Subramania* v *Sheik Ghannu*[1]. But in the same decision, it is observed by Walsh, J , that it is the cardinal principle of interpretation of a statute that we must first look to the words of the statute itself and if these words are plain, it is not permissible to consider what was the intention of the statute, or the previous history of the law

It may be stated that there is also a body of judicial opinion favouring a liberal construction, for the interpretation of the provision in such a way as would promote and fulfil the object of the Partition Act, which is to preserve the integrity of a family dwelling house and enable the members of the family to keep it for themselves as far as possible. In my view, no straining of the language one way or the other is required in this case and it would be enough, for giving effect to the intention of the Legislature, if full scope is given to the meaning of the word ' sues ' The object of the provision in section 4 of the Act is apparent, namely, the members of the family should not be forced to have a stranger-purchaser living with them in the family dwelling house, provided they are prepared to buy him out The provisions of section 4 of the Partition Act are just complementary to the second part of section 44 of the Transfer of Property Act. Under the second part of section 44 of the Transfer of Property Act, a tranferee of a share of a dwelling house belonging to an undivided family, who is not a member of the family is not entitled to joint possession or other common or part enjoyment of the house, a right recognised in the first part of the section to the transferee from a co-owner. While section 44 of the Transfer of Property Act disentitled such transferee to joint possession, section 4 of the Partition Act enables a member of the family to buy off the stranger-purchaser, if the transferee seeks partition and possession of his share. The protection afforded by section 44 of the Transfer of Property Act will be of no avail, if the purchaser from the co-owner seeks partition and separate possession. Hence the protection in the Partition Act, provided, however, a sharer in the family is prepared to buy off the stranger.

In Stroud's Judicial Dictionary, 3rd Edition, Vol. IV, at page 2912, it is noticed that the words " to sue " may be applied indifferently either to the defendant or plaintiff or to the tenant or defendant, for the suit of one party or of the other must be followed, and the words ' to sue ' not only signify, ' to prosecute ' but also ' to defend,' or ' to do something which the law requires for the better prosecution or defence of the case.' In Webster's New Twentieth Century Dictionary, among the meanings given to the words, " to sue " are: to appeal, to petition, to beseech, and in law, to petition a Court for justice or redress through legal action. The Legislature has used only the words, ' sues for partition.' While it does involve the idea of some action by a transferee to secure a partition, it does not, in my view, necessarily mean that the transferee himself must institute a suit for partition. The word ' sues ' is not just and only the equivalent ' brings a suit.' It conveys also something more, any pleading or petitioning or application for partitioning and allotment of his share would be covered by the word ' sues for partition ' And, as observed in *Assan* v *Rathumma*[2],

"In a suit for partition each co-owner, as against another, occupies in himself the role of the plaintiff as well as defendant It is in consequence of this reciprocal character of the right

1 A I R. 1935 Mad 628 at 499
2 (1899) 9 M L J 37 I L R 22 Mad 494

which co-owners have in the matter of partition that even those who are not actual plaintiffs can claim that their shares also be allotted to them by the decree "

As I look at it, even though the stranger-transferee might not have himself instituted the suit for partition, if in a suit for partition, wherein he is made a party-defendant, he asserts and applies for his share and seeks relief from Court in recognition of his rights it could properly be stated that he sues for partition. In so construing his act, there will be no undue extension of the meaning of the word or any strained construction of the language As observed by Lord Goddard C J, in *Barnes* v. *Jarvis*[1],

> " A certain amount of commonsense must be applied in construing statutes The object of the Act has to be considered "

I shall now examine the decisions cited by the learned Counsel on both sides. Mr K Parasaran, leaned Counsel appearing for the revision petitioner, refers me to the decision in *Satyabhama* v *Jatindra Mohan*[2] In that case, the alienee defendants 14 to 19, strangers to the family, who had purchased shares in the dwelling house from some of the co-sharers filed an application in Court in which they prayed that their possession might be maintained and that they might be given a separate *saham* including the portion in their possession. They prayed for an allotment of the portion that has been sold to them The claim to purchase the shares of defendants 14 to 19 was disallowed by the lower Court, as these stranger-purchasers were not plaintiffs in the case and they had not brought the suit for partition The learned Judges observed

> " Section 4, Partition Act, is a logical sequel of or corollary to section 44, Transfer of Property Act The latter Act denies the right of joint possession to stranger-purchaser who is left only with the right to sue for possession It was felt that the partition of a dwelling house especially of small dimension would divide it into unsuitable parcels, and may in some cases introduce undesirable neighbours Partition Act of 1893 accordingly came to the rescue of the members of an undivided family and gave them the right to purchase the shares obtained by strangers to the family If effect is given to the respondents' (stranger-purchasers) contention, the result will defeat the object of the legislature to secure indivisibility of a dwelling house It is possible that two persons outside the family buy two shares of two members of the family and one of them brings a suit for partition making the other a defendant and if his right to purchase a share of the dwelling house fails on any account the stranger-defendant may yet be given a share in the dwelling house because he does not happen to be a plaintiff in the suit This is certainly not what the legislature intended and we must try to put a reasonable construction on the Acts of the legislature "

Proceeding, it is observed:

> " The respondents applied for *saham* in the dwelling house and it will not be stretching too much the language of the law to treat the respondents as plaintiffs within the meaning of section 4, Partition Act This view is supported by the well-known principle that a party in a partition suit whether a plaintiff or a defendant is at the same time a plaintiff as well as a defendant This dual capacity of a party in a partition suit does not preclude even a defendant who claims a share in the dwelling house from being treated as plaintiff for the purposes of section 4, Partition Act By their application of 5th December, 1921, the respondents claimed a share in the dwelling house and they should be treated as suing for partition of the dwelling house "

The decision in *Lakshman* v. *Lahana Bai*[3], follows the above case and proceeds on the same principle Stone, C J, after observing that the matter can be disposed of by considering what is meant by the word ' sues ' and that ' to sue ' is a verb, which is not restricted to bringing a suit, ultimately concludes thus

> "I think, bearing in mind the clear intention of the Act, where in the course of another suit, the defendant applied to have a partition under the Partition Act, is correctly regarded as having 'sued' for partition within the meaning of section 4 "

A few decisions have been referred to where even the requirement of a claim for share by a stranger-transferee has not been considered necessary In all the decisions, reference is made to *Satyabhama* v. *Jatindra Mohan*[2] and *Sheodhar Prasad* v. *Kishun Prasad*[4], refers to *Satyabhama* v *Jatindra Mohan*[2], as authority for the position that.

1 (1953) 1 W L R 649
2 A I R 1929 Cal 269 at 271
3 A I R 1937 Nag 4
4 A I R 1941 Pat 4

"in a partition suit each party is in the position of a plaintiff as well as defendant and that therefore even if the transferee be on the record as a defendant, and the person who has a share in the undivided property as a plaintiff, the latter is entitled to avail himself of the provisions of section 4."

Das, J., as he then was, observes in *Abuisa Thakur* v. *Deenabandhu Banik*[1], thus:

"The object of the section is to prevent intrusion of strangers into the dwelling house of an undivided family. This object would be frustrated if a stranger-purchaser forces himself into the dwelling house of an undivided family and drives the other co-owner to file a suit as plaintiff and then figuring as a defendant is allowed to defeat the claims for pre-emption under section 4 of the Act on a narrow and literal interpretation of the section. In a suit for partition, the parties to the suit are in the position of counter claimants and it can very well be predicated of a defendant in a suit for partition that he is suing for partition. In my opinion, the present case is within the ambit of the section."

The decision of Henderson, J., in *Ramulal* v. *Binode Behari*[2], is also to the same effect. In that case it was contended that the transferee-defendant did not actually ask for an allotment and the learned Judge observed that he did not file a written statement at all and he therefore accepted the case made in the plaint that he had a certain share and that he was entitled to an allotment.

Reference was also made by Counsel to *Benchhanidhi* v. *Balaram*[3], and *Haradhone Haldar* v. *Ushacharan*[4]. In the latter case it is observed :

"The language again, though not quite happy, is not altogether incapable of a wider meaning. The section refers to a suit for partition and it is well-known that a party in a partition suit, whether a plaintiff or a defendant, is at the same time a plaintiff as well as a defendant. This dual capacity arises from the very nature of partition proceedings where each party who is a co-sharer or shareholder be he in the category of the plaintiff or of the defendant, is entitled to ask for partition of his share and separate allotment. It will, therefore, be not very inappropriate to speak of a defendant in a partition suit as 'suing for partition' and thus the transferee-defendant in the partition action may well come withing the phrase 'and such transferee sues for partition'. This wider interpretation of the section, quite legitimate in spite of its inartistic phraseology will undoubtedly promote the object of the statute and that is a strong reason why it should have preference over the other."

It may further be pointed out that in the above case the transferee-defendant-appellant claimed title to a moiety share of the suit properties as the plaintiff's sole co-sharer and asserted right to separate allotment of the same. In the circumstances, it was observed :

"From this point of view, the suit may be regarded as a transferee-defendant's suit for partition thus bringing him technically also within the phrase 'and such transferee sues for partition'."

The decision in *Ramayya* v. *Venkatasubba Rao*[5] relied upon by the lower Court is clearly distinguishable on its facts. In that case, there was an earlier suit by a stranger-purchaser for partition of his one-third share. Therein, the members of the family offered to buy up the share of this stranger-purchaser but did not avail themselves of it. The son of one of the members of the family subsequently filed a suit for partition as plaintiff and claimed to buy up the share of the stranger-purchaser whom he impleaded as the 6th defendant in his suit. The other members of the family figured as defendants 1 to 5. The learned Judge observed with reference to section 4 thus .

"The view that I take of the section is that there must be a suit at the instance of a transferee of a share of dwelling house for partition and then, if any member of the family being himself a share-holder in respect of the dwelling house, undertakes to buy the share of the transferee-plaintiff, the Court shall make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder."

Reference is made in this case to the decision of the Bombay High Court in *Khanderao Dattatreya* v. *R Krishna Mahadev*[6], which would be considered presently. Referring to the cases of Calcutta and Nagpur High Courts *Satyabhama* v *Jatindra Mohan*[7], and *Lakshman* v. *Lal ana Bai*[8], the learned Judge observed.

"I have examined the two decisions and I do not think that they afford any real assistance to the learned Counsel for the respondents with reference to the contention that he has advanced, namely, that although there is no suit now and here by a stranger-transferee of a share, his client may be allowed to buy up the 6th defendant's share on the spirit, if not on the letter, of the section. Even without decid-

1 A.I.R. 1947 Cal 426
2 A.I.R. 1949 Cal 245
3 A.I.R. 1951 Orissa 180
4 A.I.R. 1955 Cal 292
5 (1949) 2 M.L.J. 639
6 I.L.R. (1922) 46 Bom 341
7 A.I.R. 1929 Cal 269 at 271
8 A.I.R. 1937 Nag. 4

ing that a more liberal construction of the section is permissible than is warranted by its letter as virtually held in those cases, I am still of opinion that the present case can well be distinguished from them on the facts. In fact, neither of the cases actually dissents from the case in *Khande Rao Dattareya* v. *Bala Krishna Mahadev* [1] The Nagpur case makes no reference at all to the Bombay case while the Calcutta case which refers to it does not disapprove of it but only distinguishes it In both the cases, there is one peculiar feature which distinguishes them from the case before me, namely, that the stranger-transferee happened in those cases himself to apply for partition with the result that it became open to the Court notionally and virtually to regard him as plaintiff as himself or herself entitled to ask for the relief under section 4 on the basis that there was a suit in the eye of law by the stranger-transferee himself for a partition I am not sure that this sort of strain put upon the situation in those cases was rightly put. It is hardly necessary for me however to pronounce on the exact soundness in this respect of the two cases which, as I have pointed out, are on the view of facts taken therein distinguishable"

The learned Judge proceeding remarked :

"The equity of the statute, as it is sometimes called, cannot override its plain language and the contention of the respondents' learned Counsel must accordingly be repelled"

This judgment, and particularly the observations therein are strongly relied upon by the learned Counsel for the respondent. But, for one thing, the question whether in circumstances like the present one, where the transferee himself moves for a final decree for partition and claims a share against the other co-sharers, the transferee could not be considered to be one who "sues for partition" did not arise for consideration before Raghava Rao, J. and secondly the present case is in the line of cases distinguished by the learned Judge. The other Judgment of this Court in *Subbamma* v. *Verayya*[2] does not interpret the scope and factual requirements of the condition in section 4 that the stranger-transferee must have sued for partition.

The decision of the Bombay High Court in *Khanderao Dattatreya* v. *Balakrishna Mahadev*[1], which has been referred to with approval in the above case *Ramayya* v. *Venkatesubba Rao*[3], may now be considered. I do not find any support for the respondent's contention in that case. In that case two out of the three sharers in an undivided dwelling house sold their respective shares to different persons. The transferee of one sharer obtained a decree for partition of the house against the remaining sharer-member of the family (2nd defendant in that case), and the transferee of the other share, the 3rd defendant in the case. The family member, the second defendant applied under section 4 of the Partition Act to have the share of both the transferees, that is, the plaintiff and the 3rd defendant in the property valued. The Courts below granted the application of the 2nd defendant both as regards the share of the plaintiff as well as of the 3rd defendant. With reference to the purchase by the 2nd defendant, of the 3rd defendant's share, after observing that it certainly could not be said that he, the third defendant was suing for partition, Macleod, C.J., observed thus :

"The object of section 4 of the Partition Act is to enable the members of a family in the case of one of their members having transferred his share to an outsider who seeks partition, to buy out that outsider by having his share valued , and in ordinary cases such an application would be made before any preliminary decree was passed in the suit That would then put an end to the suit unless one of the defendants wished to continue and apply to have his name inserted as plaintiff in the place of the plaintiff who had been bought out

In this case the proceedings had gone so far that the Courts decided the question of partition, but the method of partition has not been decided That, however, does not make any difference, as it is not suggested that the application of the 2nd defendant is too late But it seems to me the result must be that if the plaintiff's share is valued under section 4, and defendant No 2 pays its value, then there is an end to the partition suit, as there is no longer any plaintiff to the suit, and unless one of the defendants applies to be made a plaintiff in his place, the proceedings must necessarily abate However, that is a matter for consideration when the valuation of plaintiff's share has been made and the 2nd defendant has paid the amount of the valuation. At present this appeal must be allowed to this extent, that the share of the 3rd defendant cannot be dealt with under section 4 of the Partition Act"

The other learned Judge, Shah, J , observed :

"I do not desire to express any opinion as to what the effect of the application of defendant No. 2 being granted against the plaintiff under section 4 would be upon the suit at the stage at which the right to buy out the plaintiff is asserted by the defendant No 2 That question does not arise at present"

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1 I L R. (1922) 46 Bom 341.
2 (1931) 61 M L J 552
3 (1949) 2 M L J 639

The learned Judge, proceeding further, observes

> " But I feel quite clear that section 4 is limited to the transferee who sues for partition The right given to a sharer to buy out a transferee who is not a member of the family is limited to a transferee who sues for partition and cannot be extended to any defendant-co-sharer who may claim his share in a partition suit "

In my view, the latter observations of Shah, J., are *obiter*, and the question in the form in which it has arisen for consideration now did not come up in that case. *Baishet* v *Hiransaheb*[1] is another decision of the Bombay High Court which is relied upon for the respondent. I do not think that this decision is of any help as in that case the property in question had been sold away by the brother and mother of the plaintiff to the 3rd defendant in the suit and the 4th defendant, alienee from the 3rd defendant, was in possession of the property and the claim was by the plaintiff challenging the alienation during his minority of his half share therein. It may be seen that it was held in that case that it was not section 4 but section 2 of the Act which applied.

The learned Counsel for the respondent referred to the decision in *Sakhawat Ali* v. *Ali Hussain*[2], a Full Bench case. The question referred to the Full Bench itself distinguishes that case from the instant case under consideration. The question is :

> " Whether a shareholder in a dwelling house belonging to an undivided family can take advantage of section 4 of the Partition Act in a suit for possession of the entire house and/or for partition in which he is a plaintiff and the transferee in possession is a defendant?"

The following observations of Mootham, C J , bring out the principles :—

> " It is a well-established principle that a party to a partition suit whether plaintiff or defendant is for many purposes at the same time a plaintiff as well as a defendant, and it has been held that if a defendant-transferee in a suit for partition claims a share in the dwelling house, he can be treated as a plaintiff for the purposes of section 4 In *Ramazan Baksha* v *Nizamuddin*[3] this principle was affirmed by this Court but it was held that a defendant transferee who had neither entered into possession of the dwelling house nor had claimed a share therein was not and could not be deemed to be a transferee who sues for possession within the meaning of section 4 The correctness of that decision is not challenged in this reference "

The Full Bench had to deal with the contention whether section 4 (1) could apply even where a transferee himself made no claim to a separate share, though the transferee had possession of the whole or part of the dwelling house Answering the reference the opinion was given thus :

> " Where however a word or phrase has more than one meaning, that which is to be attributed to it in a particular case must depend on the context in which it is used In the context in which the word ' sues ' is used in section 4 (1), we do not think the Legislature intended this word to mean also ' or is a defendant in a suit ' In our opinion it was clearly the intention of the Legislature that the right conferred by section 4 should accrue to the member of an undivided family only in the event of the transferee seeking to obtain partition of his share in the dwelling house and we hold therefore that the provisions of section 4 (1) will not apply to suit for partition in which stranger-defendant does not himself claim for separation of his share "

Proceeding, the learned Judges observe

> " A suit for possession of the entire dwelling house is not a suit for partition When such a suit is brought by a co-sharer against a transferee of another co-sharer, it is in the nature of a suit for pre-emption and although section 4 (1)does confer a right of pre-emption on a co-sharer against a stranger-transferee, that right is limited in its scope It can be claimed in our opinion if the transferee either sues for partition himself or makes the same claim when he is impleaded as a defendant in such a suit "

In my opinion, the Full Bench decision is authority only for the position that the stranger-defendant who does not even claim separation of his share cannot be considered to be a transferee suing for partition under section 4 (1) of the Act. This case is in fact an authority for the position that a transferee could be considered to be one who sues for partition, even though a defendant in a suit for partition, when he claims his share in the suit and prays for allotment of his share. The Full Bench, it must be noticed refers to the decision of this Court in *Ramayya* v. *Venkatasubba Rao*[4].

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1 I L R (1899) 23 Bom 77
2 A I R 1957 All 356 (F B)
3 A I R 1956 All 687
4 (1949) 2 M L J 639

For the purpose of the present case, it is unnecessary to go further. The transferee-4th defendant has himself come out with an application under Order 20, rule 18, Civil Procedure Code for partition of the properties and for passing of a final decree. In the light of the above decisions, he is certainly suing for partition and it will be open to a sharer in the family to buy him off under the provisions of section 4 of the Partition Act. There can be no doubt that the revision petitioner is entitled to buy out the 4th defendant.

It was argued for the contesting respondent that the petitioner had made only an independent application and the counter-affidavit filed in the transferee's application for final decree no undertaking has been given as contemplated in section 4 of the Partition Act This contention is devoid of merits. The transferee applied for partition of the property and for the passing of a final decree. The petitioner contending naturally that section 4 is not available to the applicant came out with his petition for relief under section 4 of the Partition Act The affidavit filed in support of his application contains the necessary undertaking to buy the share of the transferee in terms of section 4 of the Act

The revision therefore succeeds.

The order rejecting I A. No. 66 of 1963 is set aside and the matter remitted back. The trial Court will take up the application under section 4 of the Partition Act for further steps in the light of the above observations.

This petition is allowed and the petitioner will have his costs

V. K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE R. SADASIVAM

Ranganayaki Ammal *Petitioner* *

v.

M. Chockalingam *Respondent*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 7 (2) (a) and 33 (1)—Fair rent not fixed for the premises—Landlord asking for higher rent—Not an offence punishable under the Act—Demanding payment of a premium, or like sum—Punishable offence—Distinction between rent and premium

Words and Phrases—" Premium"

There is nothing illegal in a landlord asking for higher rent for the leased premises so long as fair rent has not been fixed If the tenant does not agree to pay it, the remedy of the landlord may be only to file a petition for fixation of fair rent But the mere demand of rent higher than the agreed rent cannot amount to an offence under section 7 (2) (a) read with section 33 (1) of the Madras Rent Control Act.

What is prohibited under the section is only a claim for any premium or other like sum, and not rent There is a clear distinction between " rent " on the one hand and " premium " or " other like sum " on the other. The scope of the words "other like sum" has to be understood in the light of the doctrine of *ejusdem generis*

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Fifth Presidency Magistrate, Egmore, Madras, dated 17th January, 1966 in C.C. No. 18321 of 1965

M. Srinivasagopalan and *B. Rajagopalan*, for Petitioner

V Narayanaswamy, for Respondent.

K. A. Panchapagesan for the Public Prosecutor, for State

The Court made the following

ORDER —Petitioner Ranganayaki Ammal has been convicted under section 7 (2) (a) of the Madras Buildings (Lease and Rent Control) Act, 1960, read with

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* Crl R C No 122 of 1966 19th April, 1966
(Crl R P No 120 of 1966)

section 33 (1) of the said Act, hereinafter referred to as the Act, and sentenced to pay a fine of Rs. 25 in default simple imprisonment for five weeks. The finding of the Fifth Presidency Magistrate is that the agreed rent was Rs 25 per month and that the petitioner committed the offence by demanding a higher rent of Rs. 34 per month. Section 7 (2) (a) of the Act is as follows :—

> "Where the fair rent of a building has not been fixed the landlord shall not claim, receive or stipulate for the payment of, any premium or other like sum in addition to the agreed rent."

Thus, what is prohibited is only a claim by a landlord for any premium or other like sum, and not rent. The landlord is entitled to receive a month's rent by way of advance but as it would amount to premium, a proviso has been added to enable the landlord to receive, or stipulate for the payment of, an amount not exceeding one month's rent, by way of advance. But for such proviso it would be possible to contend that the landlord would be committing an offence by receiving a month's rent as advance, as it would come within the word 'premium'

The matter is so free from doubt that it does not really require any discussion of the first principles or decisions. Under section 105 of the Transfer of Property Act, a lease of immovable property is defined as a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms In the same section it is stated that the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent. Thus, 'premium' is defined in section 105 of the Transfer of Property Act as the price paid or promised for a lease. In Shorter Oxford English Dictionary, Volume II, Second Edition, at page 1570 'premium' has been defined as a reward given for some specific act or as an incentive ; a price. In a note under the definition it is stated that if no premium were allowed for the hire of money, few persons would care to lend it. In Wharton's Law Lexicon, Fourteenth Edition, at page 791 'premium' is defined as a consideration; something given to invite a loan or a bargain, the consideration paid to the assignor by the assignee of a lease, etc. In *Vithal Krishnaji Nivendkar* v. *Parduman Ram Singh.*[1], it is stated that the word 'premium' means any amount paid for the purpose of getting a lease. It was held in that decision that if donation has been received in respect of the granting of the lease and not as a free donation for the advancement of the purposes of the Sangh, it will come within the expressions 'premium' or 'consideration' in section 18 of the Bombay Rents, Hotel and Lodging House Rates Control Act. The word 'premium' has been considered in *Abdul Rahim* v. *State*[2] It was pointed out in that decision that the scope of the words 'other like sum' has to be understood in the light of the doctrine of *ejusdem generis*. It was held in that decision that the deposit of a large sum of money free of interest, which was liable to be returned at the end of the term of lease, is not a 'premium.' It is unnecessary to consider the correctness of this view in this case. But it is clear from what I have stated that there is a clear distinction between 'rent' on the one hand and 'premium' or 'other like sum' on the other

In Cheshire's Modern Real Property, Eighth Edition, at page 883 it is pointed out that the whole policy of the Rent Control Act could obviously be frustrated if a landlord were permitted to extract a premium from the tenant on the grant of a tenancy. It is on account of this danger premiums are prohibited. It is pointed out by the same author that though the English Rent Control Act does not define a premium, it states that it includes any fine or other like sum and any other pecuniary consideration in addition to rent. The implication, therefore, is that it does not include rent

Under section 6 of Madras Act XV of 1946 the landlord was prohibited from receiving anything in excess of fair rent and any violation was made punishable

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(1963) M L J (Crl.) 517 2 I L R (1961) Mad 1243

under the said Act. There was no provision in that Act corresponding to section 7 (2) of the present Act which was introduced only by Madras Act VIII of 1951 amending Madras Act XXV of 1949. The demand for higher rent alleged to have been made by the petitioner is not a demand for 'premium' or 'other like sum' within the meaning of section 7 (2) (*a*) of the Act and the conviction of the petitioner cannot therefore be sustained.

There is a distinction between section 7 (1) and section 7 (2) (*a*) of the Act. Under the former clause a demand for anything in excess of fair rent is punishable and this distinction has been pointed out by Venkataraman, J. in *Poolamadai P. Subbier* v. *Madura Soureshtra Sabha*[1]. Venkataraman, J. has referred to several decisions and in particular to the decision reported in *Aswathanarayanaiah* v. *Sanjeeviah*[2] where it is pointed out that so long as fair rent is not fixed the parties are at liberty to enter into a contract. There is nothing illegal in a landlord asking for higher rent so long as fair rent has not been fixed. If the tenant does not agree to pay it, the remedy of the landlord may be only to file a petition for fixation of fair rent. But the mere demand of rent higher than the agreed rent cannot amount to an offence and it is certainly not an offence under section 7 (2) read with section 33 (1) of the Act. In fact, one can visualise cases where the agreed rent may be very much less than the fair rent and it could not be said that the landlord would be acting illegally in demanding higher rent as fair rent before moving the Rent Controller for fixation of fair rent.

For the foregoing reasons the conviction of the petitioner is totally unjustified and it is set aside. The fine amount, if collected, from the petitioner is ordered to be refunded to her

V.S. ——— *Petition allowed; Conviction set aside*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR M. ANANTANARAYANAN, *Officiating Chief Justice.*

K. N Pethaperumal Maistry . *Petitioner**

v.

G. Perumal Maistry . *Respondent.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), section 3 and rule 8 (1) of the Rules of 1955 —Application for eviction on the ground of arrears of rent—Payment of arrears directed by order of Court to be made on or before a certain date—Whole of the day fixed for compliance available—Order of eviction on the same date—Not valid—Hearing and disposal of the application by successive officers—Provision in the Rules

Where a Court fixes a date for the fulfilment of a certain condition the person on whom the obligation is imposed will have the whole of that day for complying with that order

Where the order of the Officer fixed a particular date on and before which the tenant has to deposit the arrears of rent, and though the name of tenant was called at about 5 P M that would not necessarily imply that he could not have still complied with the earlier direction to deposit or pay the arrears on that date An order for eviction on that very date is not sustainable. If the Court had made the order of eviction on the next day, the order will be unassailable.

Rule 8 (1) of Rules framed under the Cultivating Tenants' Protection Act provides for the hearing and disposal of an application under the Act by the successive officers presiding over the Court.

Petition under section 6-B of Madras Act XXV of 1955 as amended read with section 115, Civil Procedure Code, praying the High Court to revise the order of the Revenue Court, Thanjavur, dated 5th March, 1965 and made in Petition No. 448 of 1964.

T. R. Venkataraman, for Petitioner.

N. Krishnamurthi, for Respondent.

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1. 79 L W. (Short Notes) 22. 2 (1964) 1 An W R 69

*C R P No 562 of 1965. 2nd March, 1966.

The Court made the following

ORDER.—It is sufficient to deal with this revision proceeding within a restricted compass. The first ground on which the revision proceeding is pressed, *viz*, that the application in the Revenue Court for the eviction of the cultivating tenant (revision petitioner) was first heard by one officer, then by his successor, again subsequently by the first officer, so that there has been a change in the personnel of the officer presiding over the Revenue Court, which disentitles either officer to make a final order, is without substance. The argument may conceivably have some force, if the Madrs Cultivating Tenants' Protection Act (1955) and the Rules framed thereunder in 1955, were wholly without a provision for a contingency of this character. On the contrary, rule 8 (1) of the Rules framed under the Act by G O. No. 660, Revenue, dated 13th February, 1956, specifically declared that

"Every Court constituted under the Act shall have the powers exercisable by a civil Court in the trial of suits"

That attracts the provisions of the Civil Procedure Code and the relevant Orders, and, we have specific provision in Order 18, rule 15 (1), Civil Procedure Code, for the successor of a Judge who is prevented by death, transfer or other cause from conducting the trial of a suit, not merely to validly proceed with the action, but also to deal with the evidence recorded by the predecessor. Since this rule applies, there has been no irregularity in the trial of the eviction petition, which would justify interference in revision.

But it appears to me that the other ground on which the revision is pressed is substantial, and will have to succeed. On this aspect, we have to take the facts as rendered evident, in the record, which is conclusive. The learned Revenue Divisional Officer states that time was granted to the revision petitioner for payment of arrears of rent "on or before 5th March, 1965", failing which the eviction was to be directed. On 5th March, 1965 itself, the Court made an order for eviction, and the record shows that the name of the tenant was called in Court "at about 5 P.M." and he was found absent. Nor was he represented by anyone. The precise point came up for consideration before Natesan, J, in *Ganapathy Padayachi* v. *Dharmapuram Mutt*[1]. The learned Judge referred to *Janakumara Nainar* v *Periaswamy Goundan and others*[2], *M. Ct Muthiah* v. *Deputy Controller of Estate Duty, Madras*[3], which itself followed *Perumal Nadan* v *Sivamanji Nadachi*[4], *Muthu Chettiar* v. *Narayana Chettiar*[5], and *Chinniah Chettiar* v *T. Kumaraswamiah*[6]. The broad principle is that where a Court fixes a date for the fulfilment of a certain condition the person on whom that obligation is imposed will have the whole of that day for complying with that order. It is true that the name of the revision petitioner was called 'at about 5 P M.' But, that does not necessarily imply that he could not have still complied with the earlier direction to deposit or pay the arrears on that date. Of course, if the Court had made the order on the next day (6th March, 1965), the order will be unassailable. Under the circumstances, I am constrained to allow the revision, and to set aside the order of eviction. But, as it is not clear to me that the revision petitioner paid the arrears of rent, or offered to do so even immediately thereafter, I think that the proceeding will have to be allowed with costs of the respondent.

V S. *Revision allowed.*

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1 (1965) 2 M L J 14
2. (1948) 2 M L J 368
3. (1964) 1 M L J 279
4 (1916) I L R 39 Mad 583
5 55 M L J 274 (1927) I L.R 51 Mad 672.
6 (1933) 64 M.L J 431

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction.)

PRESENT —MR. JUSTICE P S KAILASAM

M/s Pilman Agents (Private), Ltd , Madras *Petitioners**

v

The Collector of Customs, Madras *Respondent*

Customs Act (LII of 1962), sections 12, 28 and 147—Non-levy of duty—Recovery from the agent of importer—Procedure prescribed under section 28 to be followed—If the remedy is time-barred, liability also extinguished—Order adjusting time-barred levy against the monies of agent in their deposit account —Order illegal—Liable to be quashed by writ, notwithstanding existence of an alternative remedy

Under section 28 of the Customs Act in the case of non-levy of customs duty, the Collector must within six months from the relevant date, the date on which an order for the clearance of the goods was made, serve a notice on the person chargeable with the duty calling upon him to show cause and after hearing the representation, proceed to pass the order and recover the amount If no such notice is issued within six months, the debt becomes time-barred and cannot be recovered The Act is a Code which defines the procedure and will have to be followed for collecting the duty which had not been levied and the procedure prescribed under section 28 will have to be followed It is futile for the Officer to contend that even though the remedy under section 28 is barred, he can avail himself of the general law and proceed against the agent of the importer The recovery of the amount of non-levy against the agent under section 147 of the Act is subject to following the procedure enacted by section 28

If the remedy to recover the amount of non-levy became time-barred, the liability to pay the duty is also extinguished, and it cannot be adjusted out of the accounts of the agent of the importer.

As the impugned order adjusted the accounts of the agent for the liability of the importer and which liability was time-barred, a writ will issue to quash the illegal order, in spite of the existence of an alternative remedy

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to call for the records in S./48/43/64 Misc Group 4 T.A Memo. No. 2/64 and issue a writ of *Prohibition* against the respondent restraining him from seizing moneys deposited by the petitioners in their account with them and adjusting such moneys towards their alleged time-barred claims for Rs 3,910-50 against M/s. Punj & Sons (Private), Ltd , in respect of their import of 520 bags of Asbestos Fibre Ex. S S. Ispingo, etc.

M. K. Nambiar for *K Krishnamurthi*, for Petitioners

G Ramanujam, for Respondent.

The Court made the following

ORDER —The petitioners, as clearing agents, cleared a consignment of 520 bags of Asbestos Fibre Brand Silbestos belonging to Messrs. Punj & Sons (Private), Limited from " S S Isipingo ", which arrived at Madras Harbour on 25th June, 1963. The Customs authorities allowed this consignment duty free on 29th July, 1963 when the clearance was completed On 25th April, 1964, the Assistant Collector of Customs, Appraising Department, realised that duty of Rs. 3,910-50 ought to have been levied on the goods cleared by the petitioners on 20th July, 1963. Therefore, the Collector addressed a letter to Messrs Punj & Sons In his letter, the Collector mentioned that a demand under section 28 (1) of the Customs Act, 1962 has become time-barred, but payment of the amount if made voluntarily would be accepted. The petitioners addressed Messrs. Punj & Sons on 6th May, 1964 referring to the letter of the 25th April, 1964 from the Assistant Collector of Customs and requested Messrs. Punj & Sons to do the needful in the matter Messrs. Punj & Sons did not make any payment On 25th August, 1964, the Assistant Collector wrote again to the petitioners that the importers have stated in their letter dated 8th May, 1964 that they were unwilling to pay He also intimated the petitioners that as they acted as the clearing agent for the importers, it was decided to recover the sum of Rs 3,910-50 from the petitioners by adjusting it in the petitioners' deposit account. On 24th

* W P Nos 621 of 1965 and 513 of 1966 11th April, 1966

October, 1964, the petitioners pointed out that the Assistant Collector was not right in proposing to enforce the demand by compulsorily recovering the amount by adjusting with the petitioners' account and suggested that they could take proceedings against the importers. On 4th December, 1964, the Assistant Collector informed the petitioners that the sum of Rs. 3,910-50 which was requested for as voluntary payment from the importers has not been received and as the petitioners acted as clearing agents for the importers, it had since been decided to recover the short levied amount legally due to Government from the petitioners. The petitioners were called upon to pay the same within a fortnight from the date of receipt of that letter On 9th December, 1964, the petitioners protested against the proposal of the Assistant Collector to adjust his account The petitioners eventually filed Writ Petition No. 621 of 1965 as the Assistant Collector continued to threaten to adjust the amount from their account, for a writ of *prohibition* against the Assistant Collector As already stated, before the order was served, the amount was adjusted by the Assistant Collector of Customs, which necessitated the petitioners filing Writ Petition No 513 of 1966 for a writ of *certiorari* for quashing the order of the Assistant Collector.

Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. There can be no dispute that the duty levied by the Customs authorities is a tax, and therefore, can only be levied by authority of law. Section 12 of the Customs Act, 1962 (LII of 1962) provides that duties of customs shall be levied at such rates as may be specified under the Indian Tariff Act, 1934, or any other law for the time being in force, on goods imported into, or exported from India. It is not disputed that the goods cleared by the petitioners on 29th July, 1963 are liable to duty and can be cleared after payment of duty. But by some mistake, the duty had not been levied on the goods Section 28 (1) of the Act provides that when any duty has not been levied, the proper office may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied, requiring him to show cause why he should not pay the amount specified in the notice The expression "relevant date", according to section 28 (3) is "the date on which the proper officer makes an order for the clearance of the goods. We are not concerned with the proviso to section 28 (1) of the Act. Section 28 (2) provides that the Assistant Collector, after considering the representation madeby the person on whom notice is served under sub-section (1) shall determine the amount of duty due from such person and thereupon such person shall pay the amount so determined. A reading of section 28 makes it clear that in the case of non-levy, the officer must within six months from the relevant date, which is the date on which the officer made an order for the clearance of the goods, serve a notice on the person chargeable with the duty calling upon him to show cause why he should not pay the amount. After service of the notice, under sub-section (2) he must consider the representation made by the person to whom notice is issued and then determine the amount and call upon the person to pay the amount. Action under section 28 could not have been taken, and the Assistant Collector was clearly aware of it, for in his letter dated 25th April, 1964, he had mentioned that a demand under section 28 (1) is time-barred, but a payment if made voluntarily, would be accepted. As proceedings could not be taken under section 28 no notice required under that section was given or the procedure prescribed under section 28 (1) and (2) followed.

Section 147 of the Act authorises the agent to do any act on behalf of the principal which the Act requires the owner or importer to do. Sub-section (3) of section 147 provides that when any person is expressly or impliedly authorised by the owner, importer or exporter of any goods to be his agent in respect of such goods for all or any of the purposes of this Act, such person shall be deemed to be the owner, importer or exporter of such goods. According to the proviso to the section, where a duty is not levied for any reason other than wilful act, negligence or default of the agent, such duty shall not be recovered from the agent unless, in the opinion of the Assistant Collector of Customs, the same cannot be recovered

from the owner, importer or exporter. According to this section, in the case of non-levy of duty, the duty shall not be recovered from the agent unless, in the opinion of the Assistant Collector of Customs, the same cannot be recovered from the owner, importer or exporter. According to this section, in the case of non-levy of duty, the duty shall not be recovered from the agent unless the Collector is satisfied that it cannot be recovered from the owner or exporter or importer. But the recovery of duty that had not been levied can only be subject to the provisions of section 28. On a reading of sections 12, 28 and 147 together, it is clear that in cases in which duty had not been levied, the owner should be called upon to pay if the non-levy was not due to the wilful act, negligence or default of the agent. If the amount cannot be recovered from the owner, the Assistant Collector may collect it from the agent. But the collection of the amount not levied can only be subject to the provisions of section 28, that is, the officer should give notice within six months from the relevant date to the person concerned and follow the procedure laid down in that section. If no notice is issued within six months, the debt becomes time-barred and cannot be recovered.

Mr. Ramanujam, learned Counsel appearing for the Customs Department, submitted that by section 12, the law enables the Customs Department to levy duty on goods imported. In this case the goods were subject to levy of duty and, therefore, the petitioners are liable to pay the duty. He submitted that section 147 of the Act made the agent also liable under certain conditions. According to him, section 28 provides one of the remedies in addition to the right of recovery of duty properly leviable, under the ordinary law of the land, *i.e.*, within 30 years from the date on which the duty became leviable. This contention cannot be accepted, for the Act itself, when providing for the levy of the duty, also specifies the manner in which it can be collected. The Customs Act is a Code which defines the procedure and will have to be followed for collecting the duty which had not been levied and the procedure prescribed under section 28 of the Act will have to be followed. In order to take advantage of section 28, the Assistant Collector should give notice to the person concerned within six months from the relevant date, and if he fails to do so, he cannot fall back on the general law and try to collect the amount. It is futile for him to contend that even though the remedy under section 28 is barred, he can avail himself of the general law and proceed against the petitioners.

Reference was made to section 39 of the old Act, Sea Customs Act, 1878 (VIII of 1878). The section provides that in cases in which duty had not been levied, the person concerned should pay the duty on the notice of demand issued to him within three months from the relevant date. It was contended that the liability to pay customs duty was imposed under section 20 of the old Act corresponding to present section 12 and that section 39 of the old Act corresponding to present section 28 created only a bar of limitation to the recovery of customs duty which had not been levied, which had only extinguished the remedy, but did not extinguish the liability, to pay customs duty. This contention was repelled by a Bench of the Bombay High Court in Appeal No. 71 of 1963. The Bench held that both sections 20 and 39 of the old Act must be read together and that if this was done, it would appear that when customs duty had been short levied, not only the remedy to recover the duty became barred after the expiry of the period of three months from the relevant date but also the liability to pay the deficiency in duty. I am in respectful agreement with the reasoning and conclusion arrived at by the Bombay High Court. The decision is applicable to the facts of the present case as well. In the result, the contention of the learned Counsel for the petitioners that the respondent was not entitled to adjust the amount had to be accepted.

Learned Counsel for the respondent, however, contended that an alternative remedy is available to the petitioners and as the petitioners have not availed of it, the writ petition should be dismissed. It is no doubt true that normally the petitioners should exhaust all remedies before approaching this Court, but that does not preclude this Court from issuing the writ in appropriate cases. The

adjustment of the amount in this case is clearly unjustified and illegal and this is a fit case in which, though alternative remedy has not been availed of, a writ could issue. As the amount had already been adjusted, Writ Petition No. 621 of 1965 has become infructuous, and it is dismissed. But the order of the Collector of Customs adjusting the amount of Rs. 3,910-50 is set aside and Writ Petition No. 513 of 1966 is allowed with costs Rs. 100.

V.S. ——— *W.P. No.* 513 *of* 1966 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Samidurai .. *Petitioner**

v.

Thangavelu Udayar .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 195, 407 and 476-B—Petition for making a complaint by Court against Village Munsif on the basis of a false complaint given by Village Munsif against the petitioner—Dismissal by the Sub-Magistrate—Appeal to the District Magistrate—Transfer of appeal to the Sub-Divisional Magistrate for disposal—Appeal allowed and complaint directed to be made—Order without jurisdiction

The respondent filed a petition under section 196 of the Criminal Procedure Code before the Sub-Magistrate, Vridhachalam, praying that a complaint might be filed against the Village Munsif by the Court on the ground of a false complaint filed by the Village Munsif against him and which ended in his acquittal On the dismissal of the petition by the Sub-Magistrate, an appeal was filed by the respondent before the District Magistrate, South Arcot, under section 476-B of the Code and the appeal was transferred to the Sub-Divisional Magistrate, Ulundurpet, for disposal. The Sub-Divisional Magistrate reversed the order of the Sub-Magistrate and directed that a complaint under section 211, Penal Code be filed in the proper Court. On a revision preferred against the order,

Held—the District Magistrate, South Arcot, alone had jurisdiction under section 476-B read with section 195 of the Code to dispose of the appeal made to him and the order transferring the appeal to the Sub-Divisional Magistrate was without jurisdiction

Section 476-B of the Code is a self-contained section, and it gives jurisdiction for disposal of an appeal against an order passed by a Court under section 476 or 476-A of the Code, only to the Court to which the first Court is subordinate, within the meaning of section 195 (3) of the Code The power of entertaining an appeal is conferred only on the District Magistrate Section 407 (2) of the Code conferring a power on the District Magistrate to transfer appeals to a Magistrate of the First Class subordinate to him, cannot give jurisdiction to the Sub-Divisional Magistrate to deal with an appeal under section 476-B of the Code

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Ulundurpet, dated 7th September, 1964 and made in C.A. No. 41 of 1964 (C M P. No. 115 of 1964 on the file of the Court of the Sub-Magistrate, Vridhachalam).

T. S. Arunachalam, for Petitioner.

G. Gopalaswami, for Respondent.

S. R. Srinivasan, for the Public Prosecutor, for State.

The Court made the following

ORDER.—This revision case is directed against the order of the learned Sub-Divisional Magistrate, Ulundurpet, in C A. No. 41 of 1964. The prior facts leading up to the order now under revision, are briefly the following. In C.C. No. 3609 of 1963 on the file of Sub-Divisional Magistrate, Vridhachalam, one Thangavelu, who is a well-to-do pattadar of Perianesalur village, was prosecuted by the Station House Officer, Vepur, on a charge-sheet filed under section 353, Indian Penal Code. The charge-sheet itself was filed after investigation was conducted by the Police on a complaint filed by P.W. 1 in that case, the Village Munsif of the village, who had

* Crl R C No 1985 of 1964 and Crl.R.P. No 1947 of 1964.

15th April, 1966.

alleged therein that when in pursuance of a demand for arrears of land revenue, he had distrained and attached a bull belonging to the accused, the latter had assaulted P.W. 4 the Talayari and rescued the bull from his custody. The learned Sub-Magistrate, Vridhachalam, acquitted the accused, giving sufficient reasons for finding that the prosecution case was not proved beyond reasonable doubt. Thereafter, Thangavelu, the accused, filed a petition C M.P. No. 115 of 1964 under section 195, Criminal Procedure Code, before the Sub-Magistrate, Vridhachalam, alleging that the complaint which the Village Munsif, P.W. 1, Samidurai gave to the Police about the assault and the rescue of the bull, was a false complaint, given with the intent to cause injury to him (Thangavelu) and therefore a complaint might be filed against him by the Court for the said offence against Samidurai, the Village Munsif. The learned Magistrate of Vridhachalam dismissed this petition, holding that there was not sufficient evidence to prove that the respondent, the Village Munsif, had filed the complaint against Thangavelu falsely and with intent to injure, and that the criminal case ended in acquittal, mainly because the accused was given the benefit of reasonable doubt, and because the prosecution testimony was given by interested witnesses Against this order, Thangavelu filed an appeal before the District Magistrate, South Arcot, under section 476-B, Criminal Procedure Code, who, thereafter, transferred the case to the Sub-Divisional Magistrate, Ulundurpet, for disposal. The Sub-Divisional Magistrate after an analysis of the evidence, came to the conclusion that there was adequate material to hold that a charge under section 211, Indian Penal Code, was supportable, and therefore reversed the order of the Sub-Magistrate and directed that a complaint under section 211, Indian Penal Code, be filed in the proper Court, in the interests of justice. Against this decision Samidurai, the Village Munsif, the respondent in the lower Court, has filed this revision.

Learned Counsel, Sri Gopalaswami, appearing for the respondent in this revision case, the appellant in the Court below, argued on a preliminary point, that the learned District Magistrate, South Arcot, alone had jurisdiction under section 476-B read with section 195, Criminal Procedure Code, to dispose of the appeal made to him, and that the order transferring the appeal to the Sub-Divisional Magistrate, Ulundurpet, was without jurisdiction. I am of opinion that this contention is right. Section 476-B, Criminal Procedure Code, is a self-contained section, and it gives jurisdiction for disposal of an appeal against an order passed by a Court under section 476 or 476-A, Criminal Procedure Code, only to the Court to which the first Court, is subordinate, within the meaning of section 195 (3), Criminal Procedure Code. Section 195 (3) defines that a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie, from the appealable decrees or sentences of the former Court. To understand the scope of the term 'appeals ordinarily lie' one has to go to section 407, Criminal Procedure Code, as amended, in Madras. Section 407 (1) of the amended Act, states that a person convicted on trial held by any Magistrate of the Second or Third Class may appeal to the District Magistrate. The power of entertaining an appeal is thus conferred only on the District Magistrate, against the sentences passed by a Second or Third Class Magistrate. Section 407 (2), Criminal Procedure Code, gives the District Magistrate the power to transfer appeals to a Magistrate of the First Class subordinate to him. But this power of transfer under section 407 (2), Criminal Procedure Code, cannot give jurisdiction to the Sub-Divisional Magistrate to deal with an appeal under section 476-B, Criminal Procedure Code, because of the provision in section 476-B, which specifically states that the superior Court indicated therein (which will be the District Magistrate s Court as explained above for the present case under revision) alone has jurisdiction to take the further steps outlined in section 476-B, Criminal Procedure Code, namely, the giving of notice to the parties, directing the withdrawal of the complaint etc. In other words, section 476-B, Criminal Procedure Code, is a self-contained provision, in the matter of the appeals to which it refers, and section 407 (2), Criminal Procedure Code, to extend the jurisdiction under section 476-B, Criminal Procedure Code, to a Sub-Divisional Magistrate.

An analogous situation was considered by the Supreme Court in *Kuldip Singh* v. *The State of Punjab*[1], where, in regard to certain proceedings, before a Subordinate Judge of the First Class, a complaint under section 476-A, Criminal Procedure Code, was filed by the Senior Subordinate Judge Against this complaint an appeal was made to the District Judge, who transferred it for disposal to the Additional District Judge The Supreme Court held *inter alia* that the complaint filed by the Senior Subordinate Judge in regard to proceedings before the Subordinate Judge of the First Class, was irregular, but we are not now concerned with this part of the decision. The Supreme Court also held, that when the matter came in appeal before the District Judge, it was the latter who should have passed appropriate orders either under section 376-A, Criminal Procedure Code, or by sending it to the original Court, but instead he sent it to the Additional District Judge, who had no jurisdiction to act either under section 476-A or section 476-B, Criminal Procedure Code.

Here on the same view of the scope of section 476, Criminal Procedure Code, if the District Magistrate felt that the order dismissing the petition by the Sub-Magistrate under section 476-A was irregular, only the District Magistrate had the jurisdiction under section 476-B, to decide to make the complaint, which the Sub-Magistrate ought to have made under section 476-A, but the jurisdiction could not be delegated to the Sub-Divisional Magistrate The procedure adopted by the Sub-Magistrate in this case, is clearly irregular On this preliminary ground, this revision case has to be allowed. I therefore allow the revision case and direct the case to be disposed of by the District Magistrate, South Arcot, in accordance with law.

Learned Counsel for the petitioner urged that the alleged false complaint of the Village Munsif, which led to the filing of a charge sheet against Thangavelu, was filed as a piece of evidence during the trial of the case, that if the allegations about its falsity are true, then the Village Munsif must be considered to have intentionally fabricated false evidence for the purpose of being used in any stage of a judicial proceeding, that consequently section 479-A, Criminal Procedure Code, would be attracted, and that therefore before any further steps could be taken against the Village Munsif in respect of fabricating a false complaint, the procedure under section 479-A, Criminal Procedure Code, should have been followed But since that had not been done in this case, is will be another reason for vitiating the entire proceeding Learned Counsel for the respondent on the other hand, contends that the alleged false complaint was given even before the police decided to file a charge-sheet, and that there is no question therefore, of a complaint having been intentionally fabricated, for the purpose of being used as evidence in a criminal case, and that in the above circumstances section 479-A, Criminal Procedure Code, would not apply. But since the appeal itself is being remanded to the District Magistrate, South Arcot, for fresh disposal, no useful purpose will be served, if I were to give an opinion on this point, namely, whether the case is hit by section 479-A, Criminal Procedure Code, or not It will be for the District Magistrate to consider this ground of objection, if it is urged before him and if he finds there are any merits in it. The revision is therefore allowed and the Criminal Appeal No. 41 of 1964 is remitted to the District Magistrate, South Arcot, for disposal in accordance with law.

V S. *Petition allowed.*

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1 (1956) S C J. 387.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE R SADASIVAM.

Palaniswamy Gounder *alias* Palani Gounder .. *Appellant**

v.

Nataraja Gounder *alias* Kolandai Gounder and others *Respondents.*

Criminal Procedure Code (V of 1898), section 422 and Criminal Rules of Practice, rule 208—Private complaint—Conviction with an order of compensation in favour of the complainant—Appeal against conviction—Notice to complainant desirable on principles of natural justice—Practice

Section 422 of the Criminal Procedure Code does not contemplate any notice to the complainant in an appeal preferred by an accused person against his conviction and strictly speaking it would be perfectly legal to order notice only to the Public Prosecutor But where an order for compensation has been made in favour of the complainant principles of natural justice require that notice should be given to the complainant It is desirable that the appellate Courts should see that the notices ordered to the complainants in such cases are served or at least reasonable attempts are made to serve them before disposing of the appeals

Appeal under section 417 (3) of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents Nos 1 to 3 (accused Nos 1 to 3) of offences under sections 447 and 426, Indian Penal Code, by the District Magistrate (J.) Coimbatore in C A No 320 of 1964 on his file (C.C. No 519 of 1964 on the file of the Sub-Magistrate, Udumalpet)

V S Rangaswami Ayyangar, for Appellant.

R Krishnamachari, for Respondents 1 to 3.

K A Panchapagesan, for the Public Prosecutor, for State.

The Court delivered the following

JUDGMENT —Appeal by the complainant, Palaniswamy Gounder, against the acquittal of accused 1 to 3 for the offences of criminal trespass and mischief The Sub-Magistrate, Udumalpet, who tried the case on a private complaint filed by the appellant, had convicted three of the four accused for criminal trespass and mischief and sentenced them to a fine of Rs. 25 each under each count and ordered a sum of Rs 60 out of the fine amount, if collected, to be paid to the appellant as compensation The District Magistrate, on appeal by the convicted accused ordered notice to the appellant herein, but he was not served. The learned Advocate for the appellant urged that the appeal should be directed to be re-heard by the District Magistrate as the appellant had no opportunity to support the order of compensation in his favour

Section 422, Criminal Procedure Code, does not contemplate any notice to the complainant in an appeal preferred by an accused person against his conviction and strictly speaking it would be perfectly legal to order notice only to the Public Prosecutor But where an order for compensation has been made in favour of the complainant, principles of natural justice require that notice should be given to the complainant Under rule 208 of the Criminal Rules of Practice, notices in criminal cases shall be served on parties personally unless they are represented by Pleaders in which case notice could be given to Pleaders except in cases where notice for enhancement of sentence is given In practice one or two notices are taken to the complainant in cases where orders of compensation are made, and then the matter is placed before the Judge to consider sufficiency of the notice. In *Sundararamier* v. *Chinna Palani Ambalam*[1], Horwill, J., pointed out that the fact that notice is required under section 422, Criminal Procedure Code, to go to the Crown but no mention of notice to a private party is made indicates that the parties concerned in a criminal appeal from a conviction are the convicted persons and the Crown, and that if the Crown supports the order of acquittal, then the Court is not concerned with the attitude taken by the complainant who instituted the proceedings in the trial Magistrate's Court, particularly when no important question is at issue

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* Crl A No 774 of 1964 19th April, 1966

1. (1943) 1 M L J 351

It should be noted that in that case notice was taken to the complainant but not to the Public Prosecutor as required under section 422, Criminal Procedure Code. It was held that the non-observance of the mandatory provisions of section 422 did not necessarily call for interference in revision with an order of acquittal. There does not appear to have been any order for compensation in favour of the complainant in that case. But in *Maria Susai* v. *Arogiam*[1], Horwill, J., has held that the failure of the Court in an appeal by the accused to issue notice to the complainant in whose favour an order for compensation has been made is no ground for interfering in revision with the acquittal by the appellate Court He was of the opinion that it would be grossly unfair to require the accused who was acquitted to go through a fresh ordeal because the appellate Judge heard only the Public Prosecutor which is all that section 422 required and not the complainant also.

In *Venkatavarada Iyengar* v. *Vengai Servai*[2], Burn, J., quashed the judgment of the appellate Court and ordered the appeal to be re-heard when notice to the complainant was not ordered by the appellate Court, on an appeal preferred by the convicted accused. Burn, J., held that the procedure was grossly unfair to the complainant He has pointed out that though the omission to give notice was not an illegality, it was clearly a gross irregularity and contrary to all sense of fairness. The same view has been taken in other High Courts also. In *Bharosa Naw* v. *Sukdeo*[3], it was held that an appellate Court in the exercise of proper discretion should give notice of the hearing of the appeal from a conviction to the complainant when an order of compensation has been made in his favour under section 545, Criminal Procedure Code.

In *Emperor* v. *Chunilal Bhagwanji*[4], a Bench of the Bombay High Court also took a similar view and held that a complainant in such circumstance sought to be served with notice of appeal or revision which may result in the order of compensation in his favour being set aside In the course of the judgment it is pointed out that the practice of the Bombay High Court is to direct notice in such cases only in revision and not in appeals, but that the same practice should prevail in both appeals and revisions. But the Bombay High Court refused to interfere with the acquittal of the accused in that case as the Judge had no doubt that even if notice had been served on the complainant the learned Judges would not have thought it necessary to hear the complainant's Advocate as well as the Crown who was heard and the omission to serve notice on the complainant had not vitiated the order of the Sessions Judge.

It is desirable that the appellate Court should see that the notices ordered to the complainants in such cases as the present one are served or at least reasonable attempts are made to serve them before disposing of the appeals.

Having regard to the above facts, I went into the merits of the case as I am bound to do in a criminal appeal On the facts and circumstances of the case, the accused are entitled to be acquitted, and I shall proceed to give my reasons for the same. The alleged criminal trespass in this case was on the morning of 5th November, 1963, but the complaint in this case was given to the Magistrate two days later on 7th November, 1963. Even in the sworn statement the complainant could not give any explanation for the delay and he admitted that he did not complain either to the Village Munsif or to the Police It is stated that the accused committed the offence on account of an earlier complaint regarding the prior incident on 26th October, 1963. But there is no conceivable reason why the accused waited till 5th November, 1963, to wreak vengeance against the complainant. The learned District Magistrate has pointed out the several material discrepancies in this case as to whether one kiluvai tree or more than one kiluvai tree or only a fence was cut and removed. P W. 1 is the complainant in this case P W 2 is the aunt's son of the complainant. P.Ws 3 and 4 are coolies belonging

1 (1941) 55 L W 177
2 1933 M.W.N. 729.
3 (1926) I L R 53 Cal 969
4 A.I R 1942 Bom 205

to a different village There is no reason why they came to the place of occurrence. In fact, P.W. 4 stated in cross-examination that he has not gone to the field of P W. 1 prior to the date of occurrence The complainant and the accused are adjacent land owners and there is misunderstanding between them The learned Sub-Magistrate himself has acquitted the fourth accused, who according to the complainant and his witnesses went along with the three accused and helped them to carry away the cut trees It is doubtful whether any trees were cut as spoken to by P W 1 and his witnesses The learned Sub-Magistrate has referred to the statement given by the Village Munsif during his enquiry under section 202, Criminal Procedure Code, that there were trees on the land of P W. 1 and observed that it was sufficient proof to come to the conclusion that accused 1 to 3 trespassed into the field of P W. 1 and cut the trees in question The Sub-Magistrate did not discuss the case against each accused or even the criminal intention of the several accused.

The convictions of the accused for criminal trespass and mischief cannot therefore be sustained and they are entitled to be acquitted There is therefore no ground to interfere with the acquittal of the accused This appeal is dismissed.

V.S. —— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR M. ANANTANARAYANAN, *Officiating Chief Justice.*

E K. Subramaniam .. *Petitioner**

v.

Mrs. Sundarammal .. *Respondent*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 11 (4), 18—Application for eviction on the ground of wilful default in payment of rent—Order to pay arrears of rent—Non-compliance—Order terminating proceedings and directing tenants to put the landlord in possession– Executable under section 18

An order under section 11 (4) of the Madras Rent Control Act terminating further proceedings and directing the tenant to put the landlord in possession of the building, made on the non-compliance of the interim order directing the tenant to pay the arrears of rent pending an application for eviction on the ground of wilful default in the payment of rent, is executable under section 18 of the Act

Petition under section 25 of Act IX of 1887 praying the High Court to revise the order of the City Civil Court (III Assistant Judge), Madras, dated 19th February, 1966, and made in E P No 153 of 1966 in H R C No 1593 of 1963.

V. Bhavanishankar for *R Venkatarama Sarma*, for Petitioner

B T Seshadri, for Respondent.

The Court made the following

ORDER.—This is a flagrant case of ' wilful default ' on the part of the tenant, for the record amply proves that the tenant (revision petitioner) did not pay the rent due to the landlord for nearly a year, and thereby accumulated a formidable arrear of over Rs. 1,000 Very naturally, the landlord sought the eviction of such a defaulting tenant, this is without prejudice to the contention urged by learned Counsel on behalf of the tenant (revision petitioner) that the case of his client was that the rent was only Rs 120 per mensem and not Rs 140 per mensem

Needless to say, arrears of over Rs 1,000 could never have accumulated, even if the tenant had paid the rent regularly at the rental admitted by him, Rs. 120 per mensem. The trouble was that the tenant did not pay any rent at all for a considerable period, which compelled the landlord to take proceedings for eviction. Finally, when the matter came up before the Court of the learned Rent Controller, he properly proceeded under section 11 of Madras Act XVIII of 1960 Since the tenant had not paid the rent due, he declined to go on with the proceedings, unless the tenant forthwith did so As there was no such payment, he made an order under section 11 (4) of the Act terminating further proceedings and " directing the tenant to put the landlord in possession of the building "

* C.R.P. No. 412 of 1966. 22nd April, 1966.

The decree is being executed in the City Civil Court under section 18 of the Act, and the present ground of revision is the highly technical one, that section 18 does not make an explicit reference to section 11 (4) of the Act That is the actual case, but the only implication of this is that the Legislature did not intend section 11 (4) to be a separate operative provisions in itself Had the Legislature so intended, indisputably provision would have been made in section 18 for the execution of orders under section 11 (4) But, clearly enough, the provision under which a tenant can be evicted for wilful default in payment of rent, even if resort is made to the provision, section 11 (4) is not that section, which is a section of procedure and not the actual source of the power, but section 10, sub-clause (2) towards the end of that sub-clause, where the Act states that " the Controller shall make an order directing the tenant to put the landlord in possession of the building " An order under this section is specifically executable under section 18, and hence, the decretal order of the Rent Controller's Court will have to be taken as one under section 11 (4) read with section 10, sub-clause (2) of the Act.

Apart from this point, there are absolutely no merits The Revision Petition is therefore dismissed Parties to bear their own costs.

V S ——— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT .—MR JUSTICE K S. VENKATARAMAN

P V Kuppayandi Pillai .. *Petitioner**

v

Veerakutti Goundar and others *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 101—Appointment of five trustees by the Area Committee—Application for delivery of the temple and its accounts by four only of the trustees—Fifth trustee not impleaded at all—Fact of resignation of the fifth trustee but non-acceptance of the resignation by the Commissioner on the date of the application for delivery—Application not maintainable

An application under section 101 of the Madras Hindu Religious and Charitable Endowment Act of 1959 has to be made by all the trustees appointed by the Area Committee The fact that one of the trustees had resigned but whose resignation had not been accepted by the Commissioner on the date of the application for delivery under section 101 renders the application as if that trustee had not joined in the application Such an application under section 101 is not maintainable

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sub-Divisional Magistrate (J), Sankari, dated 31st May, 1966, made in M P No 261 of 1966.

T Ramalingam, for Petitioner.

S Mohan, for Respondents.

K A Panchapakesan, for the Public Prosecutor, for State.

The Court made the following

ORDER —This is a Revision Petition under section 439, Criminal Procedure Code, against the order of the learned Sub-Divisional Magistrate, Sankari, passed under section 101 of the Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), directing delivery of the temple and its accounts to four persons. Veerakutti Goundar, Perumal, Goundar Vijjiravelu and Jagannatha Pillai Those four persons and one Kuppanna Goundar were appointed trustees of the temple by the Area Committee by their order dated 8th December, 1965, in exercise of their powers under section 49 (1) of the Act Though the application had to be made by the five persons, including Kuppanna Goundar, it was stated in the petition that Kuppanna Goundar had since resigned the trusteeship, and the petition was filed only by the four persons The application was resisted by one Kuppayandi Pillai, who claimed to be a hereditary trustee If he was a hereditary trustee, section 49 would not apply Vide *Valliammal* v *Area Committee, Madras City*[1]. He did not however specifically deny the fact alleged in the petition that Kuppanna Goundar had resigned the trusteeship

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* Crl R C No 728 of 1966 28th June, 1966
Crl R P. No 718 of 1966

1 I L.R. 1962 Mad. 812.

The learned Magistrate overruled the objection of Kuppayandi Pillai in view of the order of the Area Committee dated 8th December, 1965, and directed delivery of possession to Veerakutti Goundar. This Revision Petition has been filed by Kuppayandi Pillai.

The first point taken by his learned Counsel, Sri T. Ramalingam is that the application was incompetent in law because Kuppanna Goundar had not joined in the application though he had been appointed as one of the trustees and he cites the decision in *Angappan* v. *Deputy Commissioner, Hindu Religious and Charitable Endowments*[1] The learned Counsel now denies the allegation that Kuppanna Goundar resigned the trusteeship and wants to produce the affidavit of Kuppanna Goundar to that effect. But I see no reason to allow him an opportunity to produce the affidavit at this stage since the averment in the petition that Kuppanna Goundar had resigned was not specifically denied in the counter. Under Order 8, rule 5, Civil Procedure Code, the allegation shall be taken to be admitted. But Sri T Ramalingam says that the counter must be deemed to have admitted only the allegation that Kuppanna Goundar had resigned the trusteeship. The learned Counsel points out that it is not sufficient in law to make the resignation effective because under section 47 (3) the resignation had to be accepted by the Commissioner. That provision reads thus:

> " Every trustee appointed under sub-section (1) and subject to the result of an application, if any, filed under sub-section (4), every non-hereditary trustee appointed under sub-section (2) shall hold office for a term of five years, unless in the meanwhile the trustee is removed or dismissed or his resignation is accepted by the Commissioner or he otherwise ceases to be a trustee. "

To get over this objection Sri Mohan, the learned Counsel for the respondents, produced before me the order dated 19th May, 1966, of the Assistant Commissioner accepting the resignation of Kuppanna Goundar. That is marked now as Exhibit R-1 in the revision petition. But that shows that the resignation was accepted only on 27th April, 1966. The application under section 101 had been filed on 24th March, 1966 Sri Mohan argues that once the resignation has been accepted, it would date back to the date of the resignation But I feel difficulty in accepting his argument because the Court must be in a position to answer the question, between 24th March, 1966, and 27th April, 1966, whether Kuppanna Goundar was a trustee or not During that period the only answer which the Court could give was Kuppanna Goundar still continued as a trustee, and, therefore, under section 101, as pointed out in the Bench decision in *Angappan* v *Deputy Commissioner, Hindu Religious and Charitable Endowment*[1], he had also to join I say nothing now on the question whether it would have been sufficient to implead him as a respondent because the fact is that he has not even been impleaded as a respondent in the application On this short ground, I am afraid it has to be held that the application under section 101 was not maintainable The revision is allowed and the order of the learned Magistrate is set aside

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

G. A. Abdul Samath . *Petitioner**

v.

The Deputy Registrar of Co-operative Societies, Kancheepuram . *Respondent*

Madras Co-operative Societies Act (LIII of 1961) *and the Madras Co-operative Societies Rules,* 1963, *rule* 56 (8)—*Proceedings before Registrar or Arbitrator—Representation of party by Pleader—Prohibition against —If could be relaxed—Mistake in form of notice—Effect*

Rule 56 (8) of the Rules framed under the Madras Co-operative Societies Act, 1961, expressly enacts an absolute prohibition that in proceedings before the Registrar legal practitioners shall not be

1. (1965) 1 M.L.J. 151.

* W.P. No. 2818 of 1965. 12th November, 1965

entitled to appear to represent parties The fact that in the notice issued to the party it was mentioned due to mistake, that the party can appear in person or by Pleader, cannot make any difference when the rule is clear and the Registrar has no power to relax the rule

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 3rd respondent to accept the vakalat on behalf of the petitioner filed before the Deputy Registrar, Co-operative Societies, Kancheepuram, in claim B-1.

O. S Balasundaram, for Petitioner.

K. S. Bakthavatsalu, for Additional Government Pleader, for Respondents 1 and 3.

V. V. Raghavan, for 2nd Respondent.

The Court made the following

Order :—The petitioner seeks a writ of *mandamus* to issue to the Deputy Registrar, Co-operative Societies, Kancheepuram, to permit the petitioner to appear by a Pleader in proceedings before that officer. It is said that the proceedings before that officer are arbitration proceedings in which a claim for a large amount has been made against the petitioner. The petitioner received a notice asking him to be present either in person or by a Pleader. When he appeared with his Counsel, the presiding officer refused to accept the vakalat presented by the Counsel stating that Advocates are not entitled to represent the parties in the arbitration proceedings. The petitioner claims that when the notice issued to him specifically authorised him to appear either in person or by Counsel the Deputy Registrar had no authority to refuse to permit the Counsel to appear.

In the counter-affidavit filed on behalf of the Deputy Registrar it is stated that under the Rules framed under the Act appearance of parties by the Counsel is prohibited. It is no doubt true that the notice that was issued stated that the party could appear either in person or by Pleader. But that notice was in an absolute form under Central Act XI of 1912, which form had been inadvertently used in the present proceedings, and whatever, the notice might have stated, it is claimed that the Rules are against representation by Counsel and that no writ of *mandāmus* can issue.

It is not denied by the learned Counsel for the petitioner that under Rule 56 (8) of the Rules framed under the Madras Co-operative Societies Act, 1961, in proceedings before the Registrar or the arbitrator or a body of arbitrators or other persons deciding the dispute legal practitioners shall not be entitled to appear to represent parties. This rule enacts a prohibition. I am unable to agree with the learned Counsel for the petitioner that it is open to the Registrar to relax this rule. Nor am I willing to agree that such relaxation was ordered, on the ground that the notice issued to the petitioner directed him, to appear by a Counsel I am satisfied that the Deputy Registrar was fully justified in refusing to permit the Counsel to appear in the proceedings and his refusal is warranted by the rule cited.

No grounds exist for issuing a writ of *mandamus*. The petition is dismissed. There will be no order as to costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Thirumal Reddiar .. *Appellant**.

v.

Koppiah Reddiar .. *Respondent.*

Hindu Law—Adoption—Burden of proof—When shifts

It is no doubt true that the burden of proving an adoption is initially on the party asserting it. But where the defendant has himself admitted in a series of documents that the plaintiff is the adopted son of *A* the burden of proving that there was in fact no such adoption shifts to the defendant. What a party himself admits to be true may reasonably be presumed to be so As it could not, however, be a case of estoppel the party making the admission may give evidence to rebut this presumption. But unless and until that is satisfactorily done, the fact admitted must be taken to be established Proof of admissions by the opposite party shifts the onus

Appeal against the Decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 31 of 1962, preferred against the decree of the Court of the District Munsif of Kovilpatti in O.S. No. 337 of 1960.

R. Ramamurthy Iyer, for Appellant.

C. S. Rajappa, for Respondent.

The Court delivered the following

JUDGMENT .—The defendant is the appellant. The plaintiff filed the suit for partition and separate possession of his half-share in the property belonging to Koppiah Reddiar. Koppiah Reddiar and Ramaswamy Reddiar are brothers. Ramaswamy Reddiar had two wives Subbammal and Veerangammal. In or about 1936, Ramaswamy Reddiar was keeping indifferent health and it is the case of the defendant that the present plaintiff, Koppiah Reddiar, who was about 6 years of age was adopted by Ramaswamy Reddiar. Thirumal Reddiar, the defendant herein, is Koppiah Reddiar's second son. If the defendant fails in establishing that the plaintiff was adopted by Ramaswamy Reddiar, admittedly the plaintiff will be entitled to partition and separate possession of half-share in his father Koppiah Reddiar's property.

In order to prove the adoption, the defendant examined three witnesses on his behalf and filed Exhibits B-1 to B-4. The adoption is stated to be in the year 1936, and soon after the adoption, Ramaswami Reddiar died, Veerangammal, the second wife of Ramaswami Reddiar, also died and Subbammal as the mother of the adopted son is stated to be in enjoyment of the property belonging to Ramaswamy Reddiar. Exhibit B-1 is dated 30th July, 1946. It is a sale deed executed by one Perumal Reddiar in favour of Subbammal and plaintiff Koppiah Reddiar. Koppiah Reddiar is described in this document as the adopted son of Ramaswamy Reddiar. Admittedly, afterwards Koppiah the plaintiff attained majority. He sold some of the properties belonging to Ramaswami Reddiar for himself and as guardian of his minor son in favour of Sundararamalinga Reddiar by Exhibit-2 dated 7th August, 1957. In this document it is recited that Koppiah Reddiar the plaintiff is the natural son of Koppu Reddiar and the adopted son of Ramaswamy Reddiar. The properties that were sold were admittedly properties belonging to Ramaswamy Reddiar. Koppiah Reddiar also sold, under Exhibit B-3 on 23th July, 1959, for himself and on behalf of his minor son, the property for Rs. 200 in favour of one Perumal Reddiar and subsequently another item of property under Exhibit B-4 dated 28th April, 1959. It is admitted that the properties comprised in Exhibit B-3 and B-4 belonged to Ramaswami Reddiar. In these two documents, Exhibits B-3 and B-4 the plaintiff Koppiah Reddiar is described as the adopted son of Ramaswamy Reddiar. In 1958 one Alagu Reddiar gifted certain items of properties in favour of Koppiah Reddiar (plaintiff) under Exhibit B-5. In this document also, the plaintiff is described as the adopted son of Ramaswamy Reddiar. Apart from these documents, the defendant examined 3 witnesses on his behalf. D.W. 1

* S.A. No. 300 of 1963. 2nd December, 1965.

is Ramaswami Reddiar who spoke to the fact of adoption. The trial Court accepted his evidence, but the lower appellate Court rejected his evidence. His evidence cannot, therefore, be taken into account in the Second Appeal. The trial Court relying on the assertion of the plaintiff in the documents Exhibits B-2 to B-4 that he is the adopted son of Ramaswamy Reddiar, found that adoption had been amply proved and dismissed the suit for partition.

On appeal by the plaintiff, the lower appellate Court reversed the finding holding that the factum of adoption has not been established by the defendant. The lower appellate Court was of the view that whatever may be the recitals in Exhibits B-1 to B-5, the factum of adoption has not been satisfactorily proved and therefore the adoption could not be held to be valid.

In this Second Appeal, Mr. R. Ramamurthy Aiyar, the learned Counsel for the appellant, submitted that though the evidence regarding the factum of adoption was not accepted by the lower appellate Court, from the admissions made by the plaintiff in the documents Exhibits B-2 to B-4 the burden which lay originally on the defendant to prove adoption shifted to the plaintiff who admitted the factum of adoption in the documents and thereafter it was the duty of the plaintiff to explain the recitals in the documents and prove that there was in fact no adoption in spite of the recitals The learned Counsel for the appellant relied on the decision of the Privy Council reported in *Chandra Kunwar* v. *Chaudhri Narpat Singh*[1]. In that case one Raja Sher Singh had two issues Pran Kunwar and Jiwan Kunwar. Pran Kunwar had 3 sons; Kishan Singh, Lodh Singh and Pratab Singh. Pratab Singh's son is Raja Mukund Singh the respondent before the Privy Council. The case of the appellant was that Raja Mukund Singh the respondent was adopted by Kishan Singh and therefore he had no claim over the property of Pratab Singh to which the appellant became entitled. On the facts, the Privy Council recorded (1) that the plaintiff Makund Singh more than once under his hand and seal stated that he was the adopted son of Kishan Singh which statement was in effect an admission that he had no title to the lands he sought to recover in these actions, (2) that at the death of Kishan Singh, Makund Singh was treated as the former's adopted son and in that character and by that right installed in the *Raj Gaddi*, (3) that according to the evidence of three at least of the plaintiffs' witnesses, on the death of Kishan Singh, Makund Singh entered into the possession and enjoyment of the former's property and (4) that the explanation offered by the plaintiff for his admission in the deeds was according to the Privy Council either absurd or unproved. The Privy Council, on the facts, while laying down that the burden of proving that the adoption relied upon took place, was on the defendant observed, it could be effectually discharged by proving the plaintiff's solemn statement under hand and seal that the adoption did take place The Privy Council further observed,

> "the proof of this admission shifts the burden, because as against the party making it, as Baron Parke says in *Slatterie* v *Polley*[2], 'what a party himself admits to be true may reasonably be presumed to be so' No doubt, in a case such as this, where the defendant in not a party to the deeds and there is therefore no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established"

Holding that Makund Singh had not satisfactorily established that the admissions made by him in the documents were untrue the Privy Council held that the adoption had been proved Apart from the documents in which Makund Singh had admitted that he was an adopted son, there was no evidence relating to the factum of adoption. This decision was followed in *Chhote Lal* v *Chandra Bhan*[3], where it was held that an adoption should be considered as a legal and valid adoption, notwithstanding that there was no evidence available of the usual ceremonies of adoption having been performed In *Picha Pillai* v *Kathaperumal Pillai*[4], this Court has followed the decision in *Chandra Kunwar* v *Chaudri Narpat Singh*[1], and held that the onus of proving an adoption is initially on the party asserting it, but proof of admissions by the opposite

1 L R 34 I A 27 17 M L J 103. I L R. (1906) 29 All 184
2. (1840) 6 M & W 664 at 669.
3 I L R 45 All 59
4 (1934) 39 L W 518

party shifts the onus, on the principle that what a party himself admits to be true may reasonably be presumed to be true and until the presumption is rebutted by satisfactory explanation, the fact admitted must be taken to be established. While discussing about the burden of proof, the Privy Council in *Kanchumarthi Venkata Seetharama Chandra Row* v *Kanchumarthi Raju*[1], held that

" they cannot understand why it should not be held to be quite conclusive, not only on the fact of adoption, but on the authority to adopt It stands to reason that after such a long term of years, and the variety of transactions of open life and conduct, upon one footing, and one footing alone—namely, that the adoption was recognised as a valid act—the burden resting altogether apart from the law of limitation, upon any litigant who challenges the authority of an admitted adoption, is indeed of the heaviest order."

The Privy Council in *Chandra Shekar Baksh Singh* v *Musammat Raj Kunwar*[2], agreed with the learned Judges of the Allahabad High Court that the proof of adoption rested on the reiterated declarations by the adopted son himself, extending over a number of years, that he was the adopted son.

The learned Counsel for the respondent submitted that before an adoption can be held as valid, proof of the factum of adoption that the necessary ceremonies had been undergone and that the person who adopted had the authority to adopt should all be satisfactorily established by the person who asserts adoption, as adoption interferes with the natural mode of succession of property to a person In support of his contention he relied on the decision of the Privy Council in *Muthuswami Thevar* v *Chidambara Thevar*[3], The Privy Council held that the burden of proving an adoption rests on him who asserts it and the burden is a heavy one. This statement of law is not questioned by the learned Counsel for the appellant. The case cited does not deal with the question with which we are now concerned *viz*, the effect of admissions made by the adopted son himself in a series of documents, admitting that he is the adopted son. The law laid down in *Chandra Kunwar* v. *Chaudri Narpat Singh*[4], is not in any way doubted by this decision In the next decision relied on by the learned Counsel for the respondent, *Kishori Lal* v *Mt. Chaltibai*[5], it was held that the Privy Council has held that the burden is on the person setting up adoption to prove that fact. In the case cited, the defendant set up a plea that he was adopted by *A* during his life time and that *C* was estopped from denying the adoption *K* failed to establish the fact of adoption It was contended that even though the evidence produced in support of adoption might be unsatisfactory and not sufficient to establish the factum of adoption *C* was estopped from setting up the true facts of the case After examining the documents which were signed by *C* and which were relied on for pleading estoppel against *C* the Supreme Court held that *C* was not estopped It was held that the rule of estoppel did not apply. The Supreme Court was not concerned with the facts similar to one that arose in this case and I do not think the case in any way questioned the correctness of the decision in *Chandra Kunwar* v *Chaudri Narpat Singh*[4], Lastly, the learned Counsel relied on the decision in *Lakshmana Singh* v *Smt Rup Kunwar*[6], where it was held that there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking Contemporaneously along with the adoption, a document was executed announcing that the plaintiff was the sole heir of the defendant by virtue of his adoption On a consideration of the evidence in the case, the Supreme Court held that the validity of the adoption depended upon ceremony of giving and taking and that the ceremony had not been proved to have taken place The law laid down by the Supreme Court decision cited above is as follows

" Under the Hindu Law, whether among the regenerate caste or among sudras, there cannot be a valid adoption unless the adopted boy is transferred from one family to another and that can be done only by the ceremony of giving and taking The object of corporeal giving and receiving in adoption

1 (1925) 53 M L J 858
2. (1926) 24 L W 320
3 (1948) 2 M L J 468
4. L R 34 I A 27 . 17 M.L.J. 103 I.L.R. (1906) 29 All 184 (P C)
5 (1959) S C J 560
6 (1962) 2 S C J 472

is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adopted boy and the adoptive parent shall receive him . . But a ceremony there shall be, and giving and taking shall be part of it "

Mr Ramamurthy Aiyar, the learned Counsel for the appellant while not questioning the correctness of the law as laid down, submitted that it is not applicable to the facts of the present case

The facts in the cases cited by the learned Counsel for the respondent, *Muthuswamy Thevar* v *Chidambaram Thevar*[1], *Kishori Lal* v *Mt Chaltibai*[2], and *Lakshman Singh Kothari* v *Smt Rup Kunwar*[3], cannot apply to the facts of the present case, as in this case the statements made by the adopted son repeatedly in the documents that he is the adopted son which is relied as an admission, is enough to shift the burden on the adopted son to establish that there was no valid adoption. The decision in *Chandra Kunwar* v. *Chaudhri Narpat Singh*[4], which has not been doubted in any of the above decisions is clearly applicable to the facts of this case. The adoption in the case was in 1936 about 25 years before the disputes arose The contention of the learned Counsel for the appellant has got to be upheld and this appeal has to be allowed.

On the facts, the learned Counsel for the respondent sought to contend that the plaintiff has successfully explained the admission made by him in the three documents. The plaintiff's explanation for the above recitals in the document is that he did not know what was written in the sale deed Exhibit B-2, and that he executed Exhibit B-2, because D.W. 1 wanted him to write the document describing himself as son of Ramaswamy Reddiar. Regarding the recitals in Exhibits B-3 to B-5, his explanation was that he was living in both the houses, that is, his father's house as well as that of Ramaswamy Reddiar's house and therefore the recital was made. The explanation is futile and cannot be accepted. It has, therefore, to be found that the plaintiff has not properly explained the admissions made by him in the documents Exhibit B-2 to B-4 and his admission that he was the adopted son of Ramaswamy Reddiar can be acted upon. At the Bar, the learned Counsel for the respondent ventured to explain that originally in the sale-deed in favour of Subbammal, it was recited that Koppiah Reddiar, the plaintiff was the adopted son and therefore, in all the subsequent deeds this description has been followed. This explanation was not given in the pleadings or in the Courts below and cannot be accepted Reliance was placed on the three documents Exhibits A-1, A-2 and A-3 filed on behalf of the plaintiff Exhibits A-2 and A-3 may be rejected as of no value, as they were documents which came into existence after the suit was filed. Regarding A-1, it is a gift deed by Ramaswamy Reddiar in favour of the plaintiff It was contended by the learned Counsel for the respondent that if only he had already taken or was about to take the plaintiff in adoption, he would not have made the gift deed by Ramaswamy Reddiar in favour of the plaintiff It was contended by the learned Counsel for the respondent that if only he had already taken or was about to take the plaintiff in adoption, he would not have made the gift deed, as there was no necessity for a gift in the circumstances There is no evidence as to whether this gift deed was executed before or after the adoption. The explanation that was offered was that this document was executed before the adoption and when adoption was not decided upon. This explanation cannot be rejected as without substance

In the result, following the decision *Chandra Kunwar* v *Chaudri Narpat Singh*[4] I hold that the plaintiff has failed to explain his admissions in Exhibits B-1 to B-4 that he was the adopted son of Ramaswamy Reddiar and therefore the adoption will have to be upheld The appeal is allowed with costs throughout

No leave

R M ——— *Appeal allowed.*

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1 (1948) 2 M L J 468 (P C.).
2. (1959) S C J 560
3 (1962) 2 S C J 472.
4 L R 34 I A 27 · 17 M L.J. 103 : I L.R. (1906) 29 All 184 (P C)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K VEERASWAMI

Srimathi Periathayya *alias* P Muthu Meenakshi Veerakamulu Ammal and another .. *Petitioners**

v.

L Narasinga Rao .. *Respondent*

Madras Court-fees and Suits Valuation Act (XIV of 1955), section 70—Refund of Court-fee—Power to order—If exhaustive—Court—If has inherent power to order refund of Court-fee

Civil Procedure Code (V of 1908), section 151—Inherent powers of Court under—If could order refund of Court-fee

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) and Amending Act XI of 1964, section 30—Suit for eviction in a civil Court—Abatement of as a result of Amending Act XI of 1964—Refund of Court-fee paid on the suit—If could be claimed.

It is no doubt true that the Madras Court-fees Act provides for refund of Court-fee only under certain specified circumstances and there is no power to order refund of Court-fee in other cases But merely because there is no provision in the Court-fees Act, it is not as if a person is without remedy to obtain refund in suitable cases The Court has a limited power under section 151, Civil Procedure Code, to order refund in certain circumstances Where a person has been compelled to pay a higher Court-fee because of an erroneous view taken by the Court, the Court has inherent powers to set right its own mistake and order refund. In a fit and proper case the Court can issue a certificate and the party can apply to the Government, for refund *ex gratia* and *misericordia domini regis.*

Where a suit for eviction was properly filed in a civil Court as the law stood then, but due to the amendment of the Madras Buildings Lease and Rent Control Act by Act XI of 1964, the suit has to abate, the provisions of the Madras Court-fees and Suits Valuation Act, 1955 does not contemplate refund of Court-fee in such cases But the Court can issue a certificate of cancellation of the stamp and return the plaint so as to enable the party to apply to the Government for refund *ex gratia*

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the First Additional Subordinate Judge, Madurai, dated 14th August, 1964, and made in I A. No 510 of 1964, in O.S. No 83 of 1963.

R. Rajagopala Iyer, for Petitioners.

The Court made the following

ORDER :—This is a petition under section 115 of the Code of Civil Procedure to revise an order of the Subordinate Judge of Madurai in an application made under section 151 of the Code for a direction for refund of the Court-fee paid on the plaint on the ground that by reason of the Madras Buildings (Lease and Rent Control) Act, 1960, as amended by Madras Act XI of 1964, which came into force on 10th June, 1964, the suit stood abated and all the rights which had accrued to the plaintiffs prior to the amendment became unenforceable The suit is stated to be for ejectment of the defendant-tenant The Court below was of the view that inasmuch as there was no provision in the Madras Court-fees and Suits Valuation Act, 1955, no refund of the Court-fee could be ordered. It also relied on *Tarachand* v. *State*[1], where the view was taken that if in the Act provision was made for refund in particular cases, but not in the other cases, the inherent power under section 151 of the Code could not be invoked and the Act should be taken as exhaustive.

This Court also took a like view in *Nagaratnam*, In re.[2] But there, Panchapakesa Ayyar, J , directed issue of a certificate in exercise of the inherent powers of the Court under section 151 of the Code of Civil Procedure on the view that the Court-fees Act in the matter of refund was not exhaustive. The Court-fees Act, as it existed then, provided by sections 13, 14 and 15 for refund or Court-fee in certain specified cases. That was a case, which was not covered by any of those sections. There, the petitioner filed a Second Appeal, but then the dispute was compromised, with the result the Second Appeal became unnecessary. Thereafter, refund of the Court-fee paid on the memorandum of Second Appeal was applied for. This Court held.

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*C R P No 2591 of 1965 17th December, 1965.

1 A I R 1955 Cal. 258. 2. (1950) 1 M L J. 222.

"There was no provision of the Court-fees Act on which petitioner could rely for a refund of the Court-fee paid on a memorandum filed but withdrawn as there was no mistake of Court in making the petitioner pay the Court-fee, nor was there any excess Court-fee paid by mistake The remedy, if any, available to the Petitioner was not to apply for a refund certificate but to apply to Government *ex gratia* and *misericordia domini regis* for a refund less the one-anna-in the rupee deductions, as for spoilt stamp papers, if they are pleased to grant it"

In *Thammaya Naidu* v. *Venkataramanamma*[1], this Court took the view that it had power to allow refund of Court-fee stamps and its power was not confined to sections 13, 14 and 15 of the Court-fees Act. In a latter case, *Chidambaram Chettiar*, In re[2], it was however, held that the Court could only order refund of Court-fees under section 151, where there an was excess payment made by mistake or where on account of the mistake of the Court a party had been compelled to pay excess Court-fees. But it was pointed out by the Division Bench in that case that outside these cases the Court had no power to order refund under section 151 of the Code.

It follows, that this Court has a limitted power to order refund, in exercise of its inherent power under section 151 of the Code of Civil Procedure, but it does not extend to cases other than the instance mentioned in *Chindambaram Chettiar* In re[2], Apparently, this decision proceeded on the basis that if a party was compelled because the Court took a particular view, to pay Court-fee, it had an inherent power to set its own mistake right. It was, perhaps, on this ground the Court considered that the inherent power of the Court under section 151 of the Code of Civil Procedure would extend to refund of Court-fees in the particular cases of mistake or over sight by Court, which was responsible for the excess Court-fee paid by the litigant.

Having said all that, Panchapakesa Ayyar, J., also, as already mentioned, pointed out that the person who has paid excess Court-fee or who wants refund of Court-fee would not be without a remedy merely because the Court-fees Act does not cover the case. I think so too. The party can apply to the Government and ask for refund *ex gratia* and *misericordia domin regis*, after deduction of the usual percentage, namely, one anna in the rupee or whatever it is. The learned Judge in that case directed issue of a certificate that the Second Appeal there was not numbered or heard by the Court, that the appeal memorandum had been stamped with a certain Court-fee and that the stamps had been defaced by the High Court in the usual course. This Court also directed return of the appeal memorandum so that the applicant there might prosecute his remedy for *ex gratia* refund from the Government.

The present one is a peculiar case. When the suit was instituted it was properly instituted and the Court-fee on the plaint was also properly paid. By reason of clause (iii) of section 30 of Madras Act XVIII of 1960, the suit was competent, as it is said that the premises in question in the suit were such as would be covered by that provision. But the Madras Buildings (Lease and Rent Control) Amendment Act, 1964, enacted by section 3 that every proceeding in respect of any non-residential building or part thereof pending before any Court on the date of the publication of the Act and instituted on the ground that such building was exempted from the provisions of the principal Act by virtue of clause (iii) of section 30 shall abate in so far as the suit related to such building. The Act went even further by that section and provided that all rights and privileges which might have accrued before such date to any landlord in respect of any non-residential building by virtue of section 30 (iii) of the principal Act, shall cease and determine and shall not be enforceable. The result was, the suit could no longer be continued for no fault of the petitioners. No doubt, the Court-fees and Suits Valuation Act, 1955, does not contemplate such a situation. But it is obvious that justice demands in the circumstances that the petitioners should not be made liable for the entirety of the Court-fee. I am told that issues had been settled and the suit was ripe for hearing. Taking that into account, I think that, one-half of the Court-fee may reasonably be refunded. But, as already stated, this Court's power being limited, it will not make a direction for re-

1. (1932) 62 M L J 541 I L R. 55 Mad 641 321.
2. (1934) I L R 57 Mad. 1028 67 M L J.

fund of the court-fee in cases which fall outside the scope of Madras Court-fees and Suits Valuation Act and the particular cases covered by *Chidambaram Chettiar, In re*[1] However, there should be no objection for the Court below to issue a certificate that the Court-fee stamps on the plaint had been cancelled and that the suit, as a result of the Amending Act XI of 1964, had abated and could not be prosecuted by the petitioners, and one half of the Court-fees may reasonably be refunded after proportionate deduction at 10 pies a rupee. The Court below will have to return the plaint, if the petitioners so desire, so that they may apply to the Government for refund.

The petition is dismissed

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

C. Sundararaja Pillai . *Appellant**

v.

Messrs. Sakthi Talkies (Dindigul), Ltd. and another .. *Respondents.*

Practice—Suit on a promissory note executed by the directors of a company for balance of purchase money of property purchased for the company—Nature of—Defence of account taking in respect of other transactions inter se—*If open*

Promissory note—Suit on—Amount due being balance of purchase money—Nature of—Defence of accounting inter se—*If open—Evidence Act (I of 1872)—Section 92* Third proviso—*When could be pleaded.*

Where the plaintiff files a suit on the basis of a promissory note executed by the directors of a company in respect of the balance of purchase money of a property purchased for the company, the suit might be viewed as a suit simpliciter upon the promissory note and also to enforce the vendor's lien in respect of the unpaid purchase money especially when the plaintiff prays for a charge on the property under section 55 (4) of the Transfer of Property Act Such a suit cannot be resisted on the mere ground that there were other transactions *inter se* the parties which might necessarily involve a proceeding for rendition of account Cases of counter-claim, denial of execution or failure of consideration might stand on a different footing The mere execution of a promissory note by a purchaser does not extinguish the statutory vendor's lien Any antecedent agreement between the parties that the claim under the promissory note shall not be enforceable until accounts are finally rendered, so as to bring the defence within the third proviso to section 92 of the Evidence Act must be specifically pleaded and proved and a mere apprehension that some account might have to be looked into and ultimately settled between the parties will not be enough to sustain such a defence

Appeal against the Decree of the Court of the Subordinate Judge of Dindigul in Original Suit No. 49 of 1957.

V. Tyagaraja Ayyar and *V. C. Veeraraghavan,* for Appellant.

K. S. Desikan, K. Raman and *V. Kunchitapatham,* for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, O.C J.—The appellant is the plaintiff in a suit for recovery of an amount of Rs 24,865-59 nP. from the first defendant, Sakthi Talkies, Limited, Dindigul, alleged to be due on a promissory note executed by the eight directors of the first defendant company in favour of the plaintiff in 1953. The simple facts of the action, as stated in the plaint, were that the properties of the plaint schedule belonged to the plaintiff and the second defendant, and that the plaintiff sold the land to the first defendant firm for the construction of a cinema theatre, for an amount of Rs. 37,500. Out of this amount, an amount of Rs 20,093-0-6 was due, and the eight directors of the first defendant firm jointly executed the suit negotiable instrument in favour of the plaintiff for that sum

The action could be viewed as a suit simpliciter upon a promissory note, and also as one to enforce the vendor's lien in respect of the unpaid purchase money , for the plaintiff specifically prayed for a charge on the property, and for the sale of the site in realisation of the claim, under section 55 (4) of the Transfer of Property Act The second defendant was impleaded as a party entitled along with the plaintiff, to a moiety of the amount

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1. 67 M L J 321 (1934) I L R. 57 Mad 1028

*Appeal No. 367 of 1960. 6th January, 1966.

We are now concerned with the defences on which this claim was resisted by the first defendant firm, particularly in the additional written statement of that firm. Those defences could be tersely set forth as follows. The plaintiff and second defendant were partners of a firm of managing agents of the first defendant company, and the plaintiff was also one of the directors of the firm There were mismanagement by the Managing Agents, and the plaintiff was in the advantageous position of the possession of the account books, without a proper audit having been accomplished. It is conceded that the directors were anxious to purchase the site, for the construction of the theatre, and there are resolutions both of the General Body and the Board of Directors, approving that proposal. It was then found that, according to the plaintiff, he had taken a sum of Rs 17,406-15-6 from the funds, it is alleged that several directors felt that much larger sums might have been taken by the plaintiff, and might be due from him. But this sum of Rs. 17,406 odd was tentatively accepted, as the amount due from the plaintiff, and the promissory note for the balance was executed as alleged in the plaint, in the wake of the sale deed. The defence is that the consideration of Rs. 20,093-0-6 on the promissory note was not a figure arrived at, on a proper settlement of accounts between the parties, and that, unless such a settlement is made, the plaintiff cannot enforce the claim. There are also certain other technical defences, which we shall note a little later.

The learned Subordinate Judge, after referring to the evidence at some length, has dismissed the suit with costs of the first defendant. His reasons are (1) that the Managing Agents (plaintiff and second defendant) had played a fraud upon the company, and that the suit promissory note was not enforceable for that reason. The proper remedy of the plaintiff was to file a suit for rendition of accounts. (2) The plaintiff cannot claim a charge under section 55 of the Transfer of Property Act, because his claim is really of the character of a book-debt and not one for unpaid purchase money. (3) The promissory note has not been executed with the seal of the company affixed and the directors were not duly authorised by the company to enter into the agreement; hence, it is within the mischief of section 90 of the Indian Companies Act. (4) In any event, the plaintiff was one of the directors, and he could not have been a valid party to the resolutions which led to the purchase, under section 91-B of the Companies Act.

Learned Counsel for the appellant (Sri Tyagarajan) has stressed before us the simple argument that, upon none of the grounds adverted to by the learned Subordinate Judge, could the claim possibly have been dismissed. Learned Counsel points out, and rightly, in our view, that such a claim viewed as an action to enforce the unpaid purchase money with a charge on the property, cannot be resisted on the mere ground that there were other transactions *inter se* which might necessarily involve a proceeding for rendition of accounts, for further final elucidation. Even a suit on a negotiable instrument, viewing this action as such, cannot be resisted on any of those grounds. It is not as if the first defendant came forward with a counter-claim, in this very suit, or denied either the execution of the promissory note, or the consideration as shown thereunder. Learned Counsel for the first defendant (Sri Desikan) is conscious that the reasoning of the learned Judge on this aspect of the matter may not be sustainable. He has therefore sought to argue that the pleadings and the evidence ought to be interpreted in a different way, *viz.*, as affording a basis for bringing the defence within the *Third Proviso* to section 92 of the Indian Evidence Act. In other words, we must spell out some antecedent agreement between the parties, not directly repugnant to the terms of the sale deed or of the promissory note, to the effect that the claim for the unpaid purchase money, or the claim in the promissory note in which it is embodied, will not be enforceable, until accounts are finally rendered between the parties.

Unfortunately for the first defendant, we are quite unable to find any basis for such a point of view, either in the pleadings, or in the evidence of D W 1, the director, who has given evidence on behalf of the first defendant company All that the evidence of D W. 1 amounts to, at the highest, is that accounts were not finally looked into, when the suit transaction occurred and that there was some understanding that accounts should be ultimately settled between the parties There was also

a general impression, apparently in the minds of the other directors excluding plaintiff, that the managing agents (plaintiff and second defendant) had mismanaged the affairs, and that some acts of misfeasance could be attributable to the plaintiff. All this is very wide off the mark, when we are considering the existence of any specific evidence based on the *Third Proviso* to section 92 As learned Counsel for the appellant points out, the mere execution of a promissory note by a purchaser does not extinguish the statutory vendor's lien available to a seller, and does not estop him from an action on such lien The relevant authorities were noticed by Kailasam, J., in *Dhanikachala Pillai* v. *Raghava Reddiar*[1], and the learned Judge has cited and followed the earlier decisions of this Court to the same effect in *Krishnaswami Mudaliar* v *Vijayaraghava Pillai*[2], *Somu Achari* v. *Singara Achari*[3], as well as in *Kampiah Pillai* v *T R Hari Rao*[4]

The technical arguments based upon certain sections of the Companies Act VII of 1913 appear to be totally without foundation. Actually, the learned Judge appears to have misconceived the scope of section 90 of that Act, which has nothing to do with the execution of a promissory note by the directors of a company for any sum representing unpaid purchase money upon a transaction of sale in favour of the company The relevant provision would be section 89 of the same Act, and it is indisputable that all the other directors except the plaintiff were parties to the document. The seal of the company was not required, and that does not invalidate the transaction Again, section 91-B has no application to the present facts Even if the plaintiff, as a director, had voted in the passing of the resolution, which is denied, the only legal consequence of that would be that his vote has to be excluded from consideration. Vide *Narayandas Shreeram Somani* v *Sangli Bank, Ltd.*[5] Under section 91-B (2) he may be liable to penal action for infringement of the Company Law, but that has nothing whatever to do with the validity of the resolutions themselves. We must add that there is absolutely nothing, either in the promissory note or in the sale deed, to show that *ex facie* the amount for which the promissory note was executed was not due to plaintiff as unpaid purchase money. Actually, even such a plea in defence would be in direct contradiction of the principle of section 92 of the Indian Evidence Act.

For these reasons, we are of the view that the dismissal of the suit by the learned Subordinate Judge was quite unjustified and that, on the merits, the suit has to be decreed in favour of plaintiff (appellant). But, in consideration of the background of facts, as appearing in evidence and accepted by the learned Judge, we think that, in equity, a direction should issue that our present decree on the suit claim will not be enforceable in execution for a period of three months from this date. It is open to the first defendant company to resort to any appropriate legal action as deemed fit, subject to the law of limitation to enforce the liability of plaintiff, as claimed in the additional written statement, to render proper accounts, in respect of a much larger sum said to be due from the plaintiff If such proceedings are instituted, the first defendant company may certainly seek all such interlocutory reliefs therein as advised. But, subject to this direction, the appeal has clearly to be allowed, and the suit to be decreed, and we reverse the decree of the learned Subordinate Judge and give judgment accordingly, with costs throughout

R.M. *Appeal allowed.*

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1. A I R. 1962 Mad 423
2 (1939) 1 M L J 344
3 (1945) 2 M L J 17
4 (1910) 21 M L J 849
5 (1965) 2 S C J 379 · (1965) 2 Comp. L J 99 (1965) 35 Comp Cas 596.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

S. Govinda Iyer .. *Petitioner**

v.

The Municipal Council, Villupuram, represented by its Executive Authority, its Commissioner, Municipal Office, Villupuram, South Arcot District .. *Respondent.*

Madras District Municipalities Act (*V of* 1920), *sections* 249, 250 *and* 321 (11)—*Relative scope and applicability.*

Section 249 of the Madras District Municipalities Act provides the procedure for applications for renewal of licences, which normally expire by the end of the year. Section 250 lays down an elaborate procedure and factors to be taken into account and the authorities to be consulted by the municipality before granting the licence. Section 321 (11) provides that if orders on an application are not communicated to the applicant with in the specified period it shall be deemed to have been allowed for the year or any lesser period as mentioned in the application.

But in deciding the relative scope and applicability of these provisions in particular cases a distinction has to be made between several kinds of applications based on the time factor. Where an application is for grant of a licence which is for a permanent installation of a factory it will be governed by section 250 of the Act and since no time will be specified in the application the deeming provision in section 321 (11) of the Act will not be attracted to such cases. However, even in such cases if a party acts under the *bona fide* belief that the silence of the authority implies its consent, it will at least be a valid defence against a prosecution. In cases of applications falling under section 250 of the Act it will be impossible for the Municipality to follow the elaborate procedure laid down within the 30 days, timelimit and in the very nature of things the deeming provisions under section 321 (11) cannot apply.

But where an application is of a temporary character, such as additions to existing machinery, the deeming provisions under section 321 (11) will apply if the reply is not communicated within a months. In such cases the permission shall be deemed to have been granted for the year or such shorter period as mentioned in the application.

The Municipality cannot also insist upon an applicant for licence obtaining letters of consent from adjacent occupiers of property which is unknown to common law or the statute.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent*—Municipality L. Dis. No. 9864/64 dated 11th September, 1964 as confirmed in the Municipal Council's resolution dated 28th October, 1964 and to quash the order therein.

K. V. Venkataseshadri, for Petitioner.

K. Venkataswami, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, O.C.J.—This writ proceeding comes up before us, upon a reference by Srinivasan, J., on a question of considerable interests, with regard to the juxtaposition and the relative application of sections 249, 250 and 321 (11) of the Madras District Municipalities Act (V of 1920). The matter is partly covered by two authorities, to which our attention has been drawn, but it does appear that the particular ground of distinction upon which the learned Judge sought to place the proceeding before a Division Bench, has not been dealt with in either of these authorities.

A very few facts are essential for an elucidation of the position. We shall be quite brief, since the learned Judge has already referred to the merits at some length, in his judgment of reference. The writ petitioner is the proprietor of a printing press, wherein he has an electrically-operated treadle. On 17th April, 1964, he applied under section 250 of the Act for installing an additional treadle with a 2 H.P. electric motor. There was correspondence between the Municipal Council

* W.P. No. 1752 of 1964. 23rd February, 1966.

* Amended as per Order of Court dated 23rd July, 1965.

on the one hand and the petitioner on the other, which ultimately led to an order of the Municipal Council declining permission, dated 20th June, 1964. One of the grounds of objection in that order was that letters of consent had not been obtained by the petitioner from adjacent house-holders for the proposed installation The petitioner, in substance, claimed two reliefs Firstly, his contention was that the order or orders of the Municipal Council, taking the orders together if necessary, constituted a proceeding characterised by an error of law apparent on the face of the record There could be no obligation known to law, laid upon a proprietor of that kind desiring to instal an additional treadle with a 2 H P. electric motor, to go canvassing for letters of consent from adjacent house-holders, acquiescing in the proposed installation. On that ground, the order has to be struck down by the issue of the appropriate writ of *certiorari* The other contention was that, because of the deeming effect of section 321 (11) of the Madras District Municipalities Act, since the order of refusal was not communicated to the petitioner within thirty days of the receipt of his application by the Executive Authority, the application should be deemed to have been allowed The argument is that, in this view, the installation could be permanently maintained and run by the writ petitioner, including the additional treadle without any further licence.

We shall immediately deal with the second point, since that is the ground upon which the reference has been made by the learned Judge For this purpose, a glance is necessary at the relevant provisions of the Act. Under section 249 and the sub-clause of that section, a procedure is provided for, whereunder applications for the renewal of licences, which normally expire at the end of the year, have to be taken out. Under section 250 of the Act, which is important, there is an elaborate procedue for the obtaining of permission or a licence for the installation of a factory, workshop or workplace employing power, and, for the installation of machinery in such premises Before the Municipal Council grants the permission, it has to pay heed to a variety of factors enumerated in section 250 (4), sub-clauses (*a*) and (*b*). Such criteria would include the adequacy of provisions for ventilation and light, the adequacy of the dimensions of the rooms and doors, the suitability of exits to be used in case of fire, and allied factors relating to public health At least two types of authority have to be consulted, before the Municipal Council grants the permission, and one is the Inspector of such factories, and the other is the Municipal health staff including the Health Officer Under section 321 (11), as we have earlier pointed out, if orders on an application for licence or permission or for registration are not communicated to the applicant within thirty days after the receipt of the application by the Executive Authority, " the application shall be deemed to have been allowed for the year oi for such less period as is mentioned in the application, and subject to the law, rules, by-laws, regulations and all conditions ordinarily imposed ".

The two decisions on this aspect are, *Public Prosecutor* v. *Krishna Rao*[1], and *Ranganayakulu* v *Municipal Commissioner*[2] In the first decision, which is the decision of a single Judge of this Court (Somasundaram, J) the validity of a prosecution for offences under section 250 read with section 313 of the Act came up for consideration. In that case, though the application was made on 12th May, 1955, no final order of refusal was never communicated to the applicant. As Srinivasan, J , points out, the learned Judge took the view that the deeming provision under section 321, clause (11) would apply, and that permission must be deemed to have been granted for the installation, in the terms of that sub-clause , that being the case, the party could not be prosecuted for the offence under section 250 read with section 313 of the Act. That is all that the case decided, and it does not bear upon the present question whether the deeming provision would apply, where what is proposed is a permanent installation, without any reference to any particular period.

Again, in *Ranganayakulu* v. *Municipal Commissioner*[2], a learned single Judge of the Andhra Pradesh High Court expressed the same view, on the effect of the deeming provision on the facts of that case. The facts have been dealt with in some detail

1. (1957) 2 M.L.J. 637. 2 (1958) 2 An W R. 187.

by the learned Judge (Srinivasan, J) and we need not reiterate them here. But, we must point out that the writ of *mandamus* was issued in that case, because the statutory power conferred on the authority was coupled, in the view of the learned Judge, with a duty to perform it under the circumstances, which it failed to perform. In that case also, even though section 321 (11) has been referred to, it is indisputable that the precise ground which now comes up for our determination has not been dealt with, as such.

The ground may be now precisely stated As we have earlier said, where the Municipality is faced with the question of granting or declining permission for the permanent installation of a factory, or of machinery, which may conceivably affect the health of persons in that locality, and may also involve several precautions in the interests of the public, the procedure makes it imperative that the Municipal Council should obtain expert opinion upon several aspects, before taking a decision Learned Counsel for the Municipality would appear to be right in his contention that, if the provisions of section 250 are to be complied with in the letter and in spirit, the Municipality cannot be constrained to arrive at a decision one way or the other, within the period of a month. If there is such an obligation it would really defeat the purposes of section 250, because it may be impossible to obtain the opinions of experts on the vital aspects referred to in the sub-clause of that section.

This interpretation is further borne out by a close scrutiny of the terms of section 321, sub-clause (11), which is the deeming provision. Where two provisions of a statute do not really conflict with each other, and can be harmoniously interpreted, it is a fundamental canon of interpretation of statute, that that interpretation which reconciles them should be adopted, and not that which may spell out a conflict or contradiction. Since section 321 (11) specifically refers to the application being " demand to have been allowed for the year or for such less period as is mentioned in the application," clearly this refers to an application for permission, licence or registration, as mentioned in that sub-section, for such defined period, which may be a year or less. During the discussion of the present case, it became evident from arguments of learned Counsel that the law and the rules really provide for three types of permission or licence. One is for the installation of the factory or the machinery itself, this may be a prayer for permission in perpetuity, or may be limited to some period of a year or less. Again, it may be an addition to an existing installation, or may be for the commencement of a factory. Even where such a permission has been granted, it is conceded by learned Counsel for the writ petitioner that another permission must also be obtained, for running the machinery from year to year. It is not in dispute that renewal permission of that kind will have to be obtained from year to year, if the installation is to be of any use to the concerned proprietor, for obviously, an installation that he cannot work or run is of no use to him.

Under these circumstances, since it may be very difficult to lay down some criterion of distinction between section 250 and section 321 (11) based on the kind of installation, or the extent to which the initial installation affects the pre-existing plant, the only distinction that we can unhesitatingly declare is that based on the time factor. For permission or for a licence which is for a permanent installation of a factory, section 250 will apply, and since no time will be specified in the application, the deeming provision in section 321 (11) will not be attracted. The Municipality may apply all the relevant factors in section 250, after obtaining the opinion of experts, and it could not be deemed to have given a perpetual permission, merely because the decision is not taken within a month of the receipt of the application. However, even in such a context of facts, if a party acts under the *bona fide* belief that the silence of the authority implies its consent, we think that this might at least be valid defence against a prosecution of the kind referred to in *Public Prosecutor* v. *Krishna Rao*[1]. But, where the application is of a temporary character, whatever might be the subject-matter of the application, whether it is

1. (1957) 2 M.L.J. 637.

a small addition or a large addition to existing machinery, the deeming provision will apply, if the reply is not communicated within a month. Hence, for that period mentioned in the application, which may be a year or less, it will be deemed that permission has been accorded. At the expiry of that period, of course, the necessity to renew the licence will again occur. We answer the reference and furnish this interpretation accordingly.

With regard to the actual writ proceeding itself, the writ must clearly issue, for we agree with respect with the opinion of Srinivasan, J, that it will be an error of law apparent on the face of the record to embody in the order for refusal, and as the main ground for such a refusal an obligation to seek out letters of consent from adjacent occupiers of property which is not known either to statute or to the common law. The matter is thus released for fresh determination by the Municipal Authority in the light of the relevant criteria.

No order as to costs.

R.M. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—MR. JUSTICE P. S. KAILASAM.

Management of Messrs. Syamala Studios, Arcot Road, Madras-26.. *Petitioner**

v.

S. S. Kannu Devar and another . *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 33 and 33-A—Scope of

Section 33 of the Industrial Disputes Act specifically provides that pending conciliation proceedings the conditions of service of a worker shall not be altered and no workmen shall be punished for any misconduct connected with the pending dispute, without the express permission in writing of the authority before whom the proceedings are pending Sub-section (2) no doubt permits an employer to punish a workman or alter his conditions of service in regard to matters not connected with the pending dispute But it is essential even in such circumstances that the conduct of the employer should be *bona fide* If the action of the employer is only a colourable exercise of the power or where the termination of service was an act or victimisation or unfair labour practice the Labour Court has the jurisdiction to intervene and set aside such termination.

Murugan Mills v *Industrial Tribunal, Madras,* (1965) 2 S C J 779, followed

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Complaint No. 15 of 1963 in I.D. No. 33 of 1963 of the Presiding Officer, Labour Court, Madras. and quash the order therein dated 6th May, 1964.

P. Balasubramaniam, for Petitioner.

G. Venkataraman for *Aiyar & Dolia,* for 1st Respondent.

The Court made the following

ORDER.—The petition is filed by the Management of Syamala Studios, Arcot Road, Madras, for a writ of *certiorari* for quashing the order of the Presiding Officer, Labour Court, Madras, in Complaint No. 15 of 1963 in I.D. No. 33 of 1963. The respondent was in the employment of the petitioner as a watchman. He was getting as his wage sum of Rs. 40 per month. There was an industrial dispute referred to the Labour Court regarding the wages, dearness allowances, etc., on 19th July, 1963. When the dispute was pending, on 12th October, 1963, the petitioner refused employment to the respondent. The petitioner did not obtain the approval under section 33 of the Industrial Disputes Act. On behalf of the Management, it was contended that the respondent was working as a temporary

* W.P.No 1506 of 1964. 15th March, 1966.

gardener from 22nd January, 1963 on a monthly salary of Rs. 40 and as his services were not required after 31st August, 1963, accounts were settled with him and the respondent stopped away from work.

The Labour Court, after elaborately considering the merits of the plea put forward by the petitioner that the respondent voluntarily stopped away after giving a receipt for the arrears of pay, came to the conclusion that the respondent did not stop away from work of his own accord, but that his services were terminated on 31st August, 1963 The Labour Court found that as the services of the respondent were terminated during the pendency of the industrial dispute without the approval or permission of the Labour Court under section 33 (2) (*b*) of the Act, the respondent was liable to be reinstated. In this writ petition, it is contended that no prior sanction is required under section 33-A for retrenchment of any worker pending any conciliation proceeding, as retrenchment does not amount to alteration of service.

Section 33 of the Act provides that pending conciliation proceedings, the condition of service of a worker should not be altered and no workman punished for any misconduct connected with the dispute without the express permission in writing of the authority before whom the proceeding is pending. Under section 33, clause (2), during the pendency of such a proceeding, the employer is permitted to alter the conditions of service relating to matters not connected with the dspute and to punish a person for misconduct not connected with the dispute by discharge or by dismissal, provided that the employer applied to the authority, before whom the dispute was proceeding, for approval of his action.

Learned Counsel for the petitioner submitted that on facts, the finding of the Labour Court is perverse. I am unable to accept this contention, for the Labour Court has given very cogent and acceptable reasons for its finding

On a question of law, the learned Counsel submitted that even though the termination is held to be illegal, the employer is not bound to follow the procedure under section 33 (2), as the wrongful dismissal is not for any misconduct. The stand taken by the learned Counsel is that even if the dismissal is deliberate and without any reasons, as the employer did not take action under sub-section (*b*), section 33-A is not applicable, and whatever other remedies the workman may have, this petition is not maintainable. Section 33-A says that an aggrieved employee is entitled to approach the Labour Court whenever the employer contravenes the provisions of section 33 and the Labour Court is empowered to adjudicate upon the complaint as if it were a dispute referred to or pending before it. But this contention cannot be pressed in view of the decision of the Supreme Court holding that the workman is entitled to take advantage of section 33-A in the circumstances referred to above. The contention that was advanced before the Supreme Court in *Murugan Mills* v. *Industrial Tribunal, Madras*[1], was that the termination was not for misconduct and was meted out as a punishment and therefore section 33 (2) (*b*) did not apply and it was not necessary to obtain the approval of the Tribunal. Dealing with this contention, the Supreme Court observed that the plea of the employer would amount to a claim of 'hire and fire' as he pleased. The Supreme Court, approving the view expressed in *U. B Dutt & Co.* v. *Workmen of U. B. Dutt & Co.*[2] held that in a case like the one which the Supreme Court was considering, the requirement of *bona fide* was essential and if the termination of the service was a colourable exercise of the power or was as a result of victimisation or unfair labour practice, the Industrial Tribunal would have the jurisdiction to intervene and set aside such termination The learned Counsel for the petitioner submitted that these observations will have to be read in the context of the facts of the case and are applicable only where the worker is dismissed for misconduct. This contention cannot be accepted, for the question that was set forth for determination by the Supreme Court included termination which was not for misconduct

1 (1965) 2 S.C.J. 779 (1965) 1 L.L J 422 2 (1962) 1 L L J 374 : A I.R. 1963 S.C. 441.

or as punishment It is unnecessary to refer to other cases in view of the clear pronouncement of the Supreme Court.

It was contended that the respondent was not a worker whose dispute was under references in the proceedings before the Labour Court. This plea cannot be supported on the facts of the case, for the decision in the proceedings would have certainly affected the worker

There are no grounds for differing from the conclusion arrived at by the Labour Court This Writ Petition is dismissed No order as to costs.

It is stated that the petitioner has filed an additional affidavit stating that the Management has since closed down That fact will not make any difference in the decision of this petition.

R M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE M. NATESAN.

S. V. Palaniappan .. *Petitioner**.

v.

The Commissioner of Salem Municipality, and another *Respondents*

Madras District Municipalities Act (V of 1920), sections 216, 317 *and* 347—*Failure to remove unauthorised construction—Prosecution for—Limitation*

Where a prosecution is launched under section 317 (*c*) of the Madras District Municipalities Act for failure to comply with a notice under section 216 (3) of the said Act directing the accused to remove an unauthorised construction, the complaint should be made within three months of the commission of the offence as laid down under section 347 of the Act. It is not a case of any continuing offence and the nature of the offence is such that it is complete on the failure of the accused to remove the offending construction To such a case the proviso to section 347 of the Act has no application

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Special First Class Magistrate, Salem, dated 7th April, 1965, and made in S T R No. 164 of 1965

T Raghavan, for Petitioner.

K Alagirisami, for 1st Respondent.

B Sriramulu, for Public Prosecutor, for State.

The Court made the following

ORDER :—This revision has been preferred by the accused in a prosecution under section 216 read with section 317 of the Madras District Municipalities Act. The accused has been convicted for the offence charged and sentenced to pay a fine of Rs. 25. It is seen from the records that for putting up unauthorised constructions without obtaining the permission of the Executive Authority of the Municipality, provisional notice was issued under section 216 (1) of the Act on 31st May, 1963, requiring the accused (petitioner herein) to remove the offending constructions. After giving an opportunity to the petitioner to show cause, the Executive Authority under section 216 (3) confirmed the order on 1st August, 1964 and directed the petitioner to remove the offending constructions within three days of the receipt of the notice by the petitioner This notice was served on the petitioner on 11th August, 1964. The notice itself specifies that on failure to comply with the directions contained therein, proceedings would be taken against the petitioner under section 317 (*c*) of the Act. Clause (*c*) of section 317 providing for penalty for unlawful building, runs thus :

" If the construction or reconstruction of any building or wall

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(*c*) is carried on or completed in contravention of any lawful order or in breach of any provision contained in this Act or in any rule or by-law made hereunder or of any direction or requisition lawful-

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*Crl R.C No. 727 of 1966 and Crl. R P No. 719 of 1965 27th April, 1966.

ly given or made, or if any alterations or additions required by any notice issued under section 205 or section 215 are not duly made, or

if any person to whom a direction is given by the Executive Authority to alter or demolish a building or wall under section 216 fails to obey such direction,

the owner of the building or wall, as the case may be, shall be liable on conviction to a fine which may extend * * * * * to five hundred rupees ... "

Section 347 of the Act provides a period of limitation for commencing prosecution and runs thus :

" No person shall be tried for any offence against the provisions of this Act, or of any rule or by-law made under it unless complaint is made by the police, or the Executive Authority or by a person expressly authorised in this behalf by the Council or the Executive Authority within three months of the commission of the offence .

Provided that the failure to take out a licence, obtain permission or secure registration under this Act shall, for the purposes of this section, be deemed a continuing offence until the expiration of the period, if any, for which the licence, permission or registration is required and if no period is specified complaint may be made at any time within twelve months from the commencement of the offence ".

Learned Counsel for the petitioner relies upon the provisions of section 347 and contends that statedly the prosecution in this case has been launched on 3rd December, 1964, beyond three months after the offence had been committed. Under the notice issued by the Municipality, pursuant to the order under section 216 (3), the offending construction must have been demolished within three days of the receipt thereof That notice had been received by the petitioner on 11th August, 1964 It is a final notice and not a provisional notice. That notice itself warned the petitioner that proceedings will be taken against him under section 317 (*c*) of the Act. It goes without saying that the prosecution in this case has been commenced beyond time and cannot be sustained The statute is clear and no authority is required Learned Counsel for the petitioner, however, drew my attention to the decision of this Court in *Public Prosecutor* v *Vallaiya Mudaliar*[1]

On behalf of the respondent Municipality it is submitted that the proviso to section 347 may apply and reliance was placed on section 199 of the Act which provides that the construction or reconstruction of a building shall not be begun unless and until the Executive Authority has granted permission for the execution of the work But it is clear that the present case comes under section 317 (*c*) of the Act The prosecution in this case is for failure to comply with the requisition under section 216 (3) of the Act, and this is not a case of any continuing offence The offence is complete on the failure of the petitioner to remove the offending construction within three days of the receipt of the notice as directed. To such a case the proviso to section 347 has no application In the circumstances the contention of the learned Counsel for the petitioner that the period of limitation is only three months has to be accepted. The revision therefore succeeds. The petitioner (accused) is acquitted and the fine amount, if collected, will be refunded

R M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE T VENKATADRI

Netaji Bus & Lorry Service, Madras .. *Petitioner**

v

S G Gurumurthy . *Respondent*

Limitation Act (IX of 1908), Article 31—Delivery of goods by carrier—Non-delivery—Suit for compensation—When the goods ought to be delivered—Starting point for limitation.

The date of despatch, according to the case of defendant, was 2nd March, 1961 The plaintiff sent a registered letter to the defendant informing non-delivery and in the absence of a satisfactory reply, issued a registered notice on 5th March, 1962, and filed the suit on 10th December, 1962 On the question of limitation

1. A.I.R. 1948 Mad. 470.

*C R P No. 974 of 1963. 1st April, 1966.

Held, the suit is barred under Article 31 of the Limitation Act. Time, would begin to run after a reasonable period has elapsed on the expiry of which the delivery ought to have been made. Article 31 does not contemplate the period of one year from the date of notice

Petition under section 25 of the Provincial Small Causes Courts Act praying the High Court to revise the decree of the Court of the District Munsif of Tiruthuraipundi dated 25th February, 1963, and passed in S C S No. 890 of 1962

T. L. Nagaraja Rao, for Petitioner

G Jagadesa Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of a Small Cause Suit instituted by the respondent herein for the recovery of Rs. 175 being the cost of the empty cylinder which was delivered to the branch office at Tiruthuraipundi of the petitioner herein. The respondent contended that the cylinder had not been delivered to the proper person The petitioner-defendant resisted the suit on the ground that it was barred by time and that the trial Court had no jurisdiction to entertain the suit as the entire cause of action arose at Madras. The lower Court decreed the suit in favour of the respondent herein. It is against this judgment and decree that the defendant has come to this Court with this revision petition.

The only point that was argued by the learned Counsel for the petitioner is the question of limitation According to him, the date of despatch of the consignment is 2nd March, 1961. The respondent sent a registered letter to the petitioner herein informing them that the goods had not been delivered. As he did not get any satisfactory reply he issued a registered notice on 5th February, 1962, and filed a suit on 10th December, 1962, *i.e.*, after a period of ten months. Therefore, there is abnormal delay in filing the suit Hence, it was contended by the petitioner that the suit was barred by limitation under Article 31 of the Limitation Act To support his case, he drew my attention to a decision in *Bootamal* v *Union of India*[1]. In that case, the Supreme Court had to construe the scope of Article 31 of the Limitation Act. Their Lordships at page 1719 of the report observed.

> "Reading the words in their plain grammatical meaning they are in our opinion capable of only one interpretation, namely, that they contemplate that the time would begin to run after a reasonable period has elapsed on the expiry of which the delivery ought to have been made The words 'when the goods ought to be delivered' can only mean the reasonable time taken in the absence of any term in the contract from which the time can be inferred expressly or impliedly in the carriage of the goods from the place of despatch to the place of destination"

In the present case, the goods were delivered to petitioner's branch on 2nd March, 1961. It is contended by the learned Counsel for the petitioner that even allowing one month time from 3rd March, 1961, the respondent ought to have filed the suit within one year from that time, but the suit has been filed only on 10th December 1962 Hence there is abnormal delay in filing the suit which is barred by limitation. But this argument is met by the learned Counsel for the respondent that under Article 31 and even according to the interpretation of Article 31 in the judgment of the Supreme Court, the period of limitation would run from the date of the notice, *viz.*, 5th February, 1962 If I agree with him, the suit will be in time. But I cannot accept his contention because this would allow the respondent to issue a notice at any time and then file a suit within one year from that date. Article 31 does not contemplate the period of one year from the date of notice Therefore, the suit is evidently barred by limitation, and it is not maintainable.

In the result, the Civil Revision Petition is allowed In the circumstances, the parties will bear their own costs throughout The petitioner will be entitled to the refund of the amount deposited by him

V.S. *Petition allowed.*

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1 A I R. 1962 S C. 1716

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT:—MR JUSTICE K VEERASWAMI AND MR JUSTICE M. NATESAN

The Buckingham & Carnatic Company Ltd, and others .. *Petitioners**

v.

The State of Madras represented by Secretary, Revenue Department *Fort St George*, Madras-9 and others .. *Respondents.*

Madras Urban Land Tax Act (XXXIV of 1963)—*Legislative competency and validity—If falls within the purview of Entry* 49 *of List II or Entry* 86 *of List I of the Seventh Schedule to the Constitution of India* (1950)—*True scope and ambit of Entry* 49 *of List II and Entry* 86 *of List I—Act if void as violating Article* 14 *of the Constitution.*

Constitution of India (1950), *Article* 14—*Madras Urban Land Tax Act (XXXIV of* 1963) *if liable to be struck down under Article* 14 *as discriminatory.*

The Madras Urban Land Tax Act (XXXIV of 1963) squarely falls within the ambit of Entry 49 of List II of Schedule VII of the Constitution of India and does not to any extent or in any manner trench on Entry 86 of List I The contention that the Act is incompetent under Entry 49 in List II but falls within the purview of Entry 86 in List I is therefore unsustainable

The argument that Entry 49 in List II of Schedule VII of the Constitution of India should be read with Entry 5 in List II and in the light of legislative history, and that if so read, Entry 49 in List II will be seen to be of restricted scope and will enable only levy of tax on lands for the purpose of local authorities based on annual rental value and cannot be used for raising general revenue for purposes of the State, is clearly unsound Under the Constitution of India the legislative power is distributed between the Parliament and State Legislatures by specific and express Entries in the three Lists The Entries occurring as they do in so fundamental and such an organic document as the Constitution should receive a broad and liberal interpretation and cannot be restricted in scope and amplitude by preconceived or apriori reasoning or with reference to external factors The most direct, proper and reasonable way of construing the Entries it to look at the language itself in each of them, read and understand it in the grammatical and natural sense It will not be right first to explore into the history and practice of prior legislation and then in the light and background of it, read an Entry and then fix its scope and meaning Where the language is clear it is not permissible to depart from its plain tenor and scope and import into it extraneous considerations in order to cut down or restrict its ambit and meaning There is nothing in the plain language of Entry 49 in List II to suggest that the power under this head is confined to taxation for municipal or local purposes and does not extend to raising taxes towards general revenue for the State The Entry is in general terms and the word 'taxes' in it is all pervasive and is not confined to local taxation. Any imposition or charge, the incidence of which is on lands and buildings will be within the purview of Entry 49 in List II and therefore it will be competent for the State Legislature An impost on lands and buildings does not become any the less so, because the extent of the liability is measured or quantified in terms of certain percentage of their market value or some other yard-stick like acreage or floorage basis. So long as the object of taxation remains to be land or building, the essential character of the charge also remains the same irrespective of the mode or manner or basis adopted for taxing the quantum of liability under the charge or impost There is no warrant in the language of Entry 49 in List II for the contention that the power is confined to an impost based only on rating value or that the nature of the impost as falling within the purview of the Entry depends on whether the impost is based on a certain percentage of the annual value as distinguished from the capital value.

Thus, the power under Entry 49 in List II is comprehensive and complete to impose a tax on land and buildings either for purposes of general revenue or local bodies including municipalities, and it is quite open to the Legislature in exercise of its power to pick and choose, subject of course to constitutional limitations, a convenient mode or basis of fixing the extent or quantum of liability under the charge.

Further, the power under Entry 49 in List II cannot be said to have been taken away or exhausted merely because a similar levy on the same subject-matter under the same Entry is already in force under a different Act on a different basis The State Legislature while enacting under Entry 49, List II, is competent to authorise levy of two different taxes on the same subject-matter on two different basis.

Entry 49 in List II and Entry 86 in List I of Schedule VII of the Constitution of India are distinct and different from each other and do not either overlap or stand to any extent on a field common to both so as to call for a reconciliation between conflicting areas of power and restricting the scope of one Entry in order to define the limit of and give full effect to the other power. Entry 86 in List I relates to a charge on the net economic value of the totality of assets belonging to an individual or a company and the levy can be collected only from the owner of the assets. On the other hand, Entry 49 in List II is concerned with imposition of taxes on lands and buildings *qua* lands and buildings irrespective of their economic value and the levy is not necessarily on the owner but the incidence may be on the occupier So long as the object of taxation is land or building, the measure of tax would

*W.P Nos 2191 of 1965, etc. 25th March, 1966

make no difference to the incidence of tax on such land or building The measure may be on the basis of annual letting value or gross market value of the lands or buildings or some other factor like acreage or floorage space or even the user to which the land and the building may be put The choice of the particular basis or machinery is entirely within the discretion of the Legislature, as a matter incidental or ancillary to the power to levy tax on lands and buildings

The pith and substance of the Madras Urban Land Tax Act is that for the purposes of general revenue of the State it imposes a tax on urban lands and the tax is collected from the owner of such urban land The term "owner" is defined as to include, among others, an occupier The basis of computation of the value of the lands for imposing the tax is not related to the net economic value of the urban land Having regard to these features, the Act falls squarely within the ambit of Entry 49 in List II and does not trench of Entry 86 in List I and is entirely within the competence of the State Legislature

However, the Madras Urban Land Tax Act is liable to be struck down as violating Article 14 of the Constitution of India because the tax under the charging section (section 3) of the Act is levied on an urban land not on the actual market value of such urban land but on the average value of lands in a locality known as sub-zone

That the fundamental rights in Part III of the Constitution of India apply to tax laws in now beyond question Tax laws should, therefore, not only answer the test of legislative competency but should satisfy that they are not in contravention of the fundamental rights of which equality is clearly one

The charging section of the Madras Urban Land Tax Act expressly adopts the average market value of the urban land in a sub-zone as determined under section 7 (2) of the Act, as the basis for determination of the extent of liability to tax on the urban land The rate of tax is fixed at 0 4 per centum of the "average market value" of the urban land in a sub-zone The very expression "the average market value demonstrates that it is not the actual market value of the urban land which is taxed but it is the mean of uneven figures representing market values that forms the basis for the measure of the tax The phrase "average market value of the urban land" definitely conveys the idea of the arithmetic mean of a series of market values The burden of tax which is unrelated to the market value thus falls unequally upon lands and consequently on their owners or occupiers

Urban lands in the same sub-zone are made to bear unequal burden, unequal in the sense that the burden is not related to the market value of each urban land but on the average market value applied to it Urban land of lesser market value has to pay a heavier tax than similar land but of higher value which bears, on account of the averaging with the other land, a lower tax There is in the charging section a total lack of classification of urban lands according to their market values and correlation had application of the rate of tax to such market value Thus section 3 of the Act clearly denies to owners of urban lands equal protection and violates Article 14 of the Constitution of India The charge is not on the basis of indicia or factors which relate to the particular land of an assessee but on considerations extraneous thereto, namely, those relevant to other lands of other assessees Sections 6 and 7 of the Act do not furnish proper criteria and serve as a definite guide in the matter of classification of zones and sub-zones and determination of the average market value The charging section should therefore be struck down as unconstitutional Without the charging section the rest of the Act cannot independently exist and therefore the entire Act is void and unenforceable.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith and his reply affidavit in W P. No. 2191 of 1965 and also the pleadings therein the High Court will be pleased to issue a Writ of *certiorari* calling for the records connected with the final settlement Scheme in respect of the North Madras F. Zone (Perambur) Village framed under section 10 (2) of the Madras Urban Land Tax Act 1963, by the Commissioner of the Urban Land Tax Madras and quash the same etc.

V. K Thiruvenkatachari for *King & Partidge, A R Ramanathan, V. Vedantachari, V. Suresham, R S Venkatachari, R Mohan, S. Narayanaswami, C. S. Prakasa Rao, S. K. L. Ratan, V. Thyagarajan, U. Somasundaram, P. Balasubramaniam, V Janakiraman, P. C Sarangapani, K Kumaraswami, P Venkataswamy, P Kannan, A. Sundaresan, G. K. Damodara Rao, G. Ramanujam, T. V Srinivasachari, M. Ramachandran, C. Vasudevan, K. Radhakrishnan, V. Shanmugham, K V Narasimha Rao, M. A. Shatala, S V K. S. Rangaswamy Ayyangar, K Kumaraswami, N Venkatarama Iyer, E R. Krishnan, K. E Rajagopalachari, K Shanmugham, T Aravamudhan Ayyangar, G. Narayanan, A Doraiswami Iyengar, N Arumuchalam, S Nainarsundaram, P. V. Subramaniam, P. K. Janakiraman, N Sivamani, R. G Rajan, K Hariharan, M. A Rajagopalan, N. M. Manivarma, C Sudarsana, K Ramaswamy, A. Dorainathan, Habibullah Budsha, V. Narayanaswamy, T T Srinivasan, M M Ismail, Padmanabhan, P B Krishnamurthy, T Sathiadev, T R. Thyagarajan, T S Rangarajan, N Appu Rao, N. C Raghavachari, K. S Naidu, P S Raman, K. K Venugopal, R Parthasarathy, T Raghavan, T R.*

Srinivasa Iyengar, V. Seshadri, P. R Gokulakrishnan, T N C. Srinivasavaradhacharia, M. A Sadanand, K. Narayanaswami Mudaliar, T Chengalvorayan, K. Parasaran, T S. Krishnamoorthi Iyer, M P Subbhayya, R Narayanan, and *C P Rajagopala Ayyangar,* for Petitioners

The Advocate-General *N Krishnaswami Reddy* and *K. Venkataswami,* for Additional Government Pleader on behalf of State

The Judgment of Court was delivered by

Veeraswami, J—The petitioners, who are affected by the provisions of the Madras Urban Land Tax Act, 1963 (Madras Act XXXIV of 1963), assail its validity on grounds of legislative incompetency to enact it and of violation of constitutional limitations The petitions are by different owners of urban lands in the City of Madras to quash the notification either under section 9 or under section 16 (3) of the Act, in so far as they relate to the petitioners, or the levy and demand of tax on some of them under its provisions. To deal with the legal contentions, it will suffice to mention the facts in one or two petitions, as the facts in almost all the petitions are related and of more or less similar pattern, except as to particular owners, the locality of the lands in different zones and sub-zones and their character and market value If it is necessary, reference will be made to other specific facts in disposing of the prayer for quashing of the urban land tax and Settlement Schmes prepared and published under the Act

In W. P. No. 1614 of 1964, the petitioner is the owner of property in R S. No. 1693/1, Mylapore, its area being 4 cawnies 1 ground and 1595 square feet. The building on the land bears several door numbers in Luz Church Road, Royapettah High Road and Veerabhadran Street, Mylapore. By a notification dated 7th October, 1964, the Act has been extended to the area of Mylapore, among the various other areas in the city, and he has been, pursuant to the Notification, included in the provisional list of assessees as per section 16 (3) of the Act and Rule 6 (3) of the Madras Urban Land Tax Rules, 1963, and the list, among other particulars, contains a description of the extent of the land in respect of which the petitioner is liable to pay urban land tax. Under sections 17 to 21, the inclusion of his name in the provisional list of the assessees would lead to demand of tax from him. After making reference to various sections of the Act, the petitioner submits that the basis of the levy of urban land tax, as provided under that Act, is arbitrary and leads to discrimination. The tax is levied under the charging provision not on the actual market value of such urban land, but on the average value of lands in a locality For the purpose of taxation, the entire area in a sub-zone is taken as a unit and the tax so arrived at for the locality is distributed among the owners on the basis of the extents owned by each owner in the locality, with the result that a person owning a piece of a very inferior land of small value in a sub-zone, where the average value of the land is very much more, will be made to pay tax not on the value of his land, but on the market value of lands of others The average market value, which is taken into account, is the gross value and not the net value and the net value of one owner will be different from the net value of another owner. Further, the only objections, which are contemplated under the Act, are the objections relating to the draft settlement scheme prepared under section 8 of the Act and can relate either to the delimitation of sub-zone or to the average market value of the land of the particular assessee The provision for objections under sections 9 and 12 is merely farcical. There is also no provision for objecting to a particular land being treated as 'urban land' The definition of 'urban land' leaves to the arbitrary determination by the Urban Tax Authorities the question whether a particular land is capable of being used as a building site; and there is also no warrant in excepting from the definition any land which is registered as wet in the Revenue Account of the Government and used for the cultivation of wet crops. It is not the registry that distinguishes an urban land from a non-urban land The remedies provided under sections 11 to 13 of the Act are illusory and further there is no provision in the Act by which the assessee can have the correct market value of his urban land assessed The jurisdiction of the

civil Court is also barred from deciding or dealing which any question which arises or decided by the authorities under the Act Sections 26 and 31 of the Act are repugnant to the fundamental rights under Article 19 (1) (*f*) of the Constitution The provisions of section 29 of the Act replacing the existing tenures by imposition of urban land tax and purporting to be in lieu of other assessments offend Article 372 (1) of the Constitution Such tenures without being altered by a law properly enacted cannot be defeated by section 29 of the Act The Act, therefore, offends Articles 14, 19 (1), (*f*), 265, 31 (2) and 372 (1) of the Constitution In addition, the petitioner say that the Act is not competent under Entry 49 in List II of Schedule VII of the Constitution but falls within the purview of Entry 86 of List I. In certain other petitions, a further submission is made that having regard to the history and legislative practice prior to the Constitution the power under Entry 49 read with Entry 5 should be limited to imposition of tax for municipal purposes and cannot be availed of for purposes of general revenue

The petitioner in W P No 2191 of 1965 is the Buckingham and Carnatic Company Limited, which prayed that the demand of urban land tax served on it under section 22 of the Act for fasli 1373 in relation to R S No 144 in Perambur Village be quashed. The petitioner is the owner of the Buckingham and Carnatic Mills in Perambur and, in connection with its business, it is the owner of the lands in Perambur Village The properties involved in the petition are stated to be in twelve blocks, each block comprising numerous survey numbers on some of which quit rent has till now been levied by the Government, the other survey numbers are held on payment of ground-rent to the Government and a few items free of assessment The petitioner, as in the other petitions, is questioning the validity of the Act itself, besides the legality and correctness of the individual demand notices on certain grounds The further point, stated in attack on the validity of the Act, is that while the Madras Urban Land Tax Act is one imposing a tax on the lands falling under Entry 49, List II in Schedule VII of the Constitution, the property tax levied under the Madras City Municipal Act, 1919 is also a tax on lands and buildings falling under the same Entry and that it is *ultra vires* and incompetent for the State Legislature to levy two different taxes on the same property under the same Entry The municipal annual value was fixed by the Corporation of Madras in respect of certain buildings including the land appurtenant to them and the Corporation has levied tax in respect of such vacant lands The provisions of the Act relating to payment of tax at a percentage of the average market value of the urban land in a sub-zone are invalid and *ultra vires* as being arbitrary and without any guidance and further because the actual provisions are meaningless and unworkable. Section 3 refers to the average market value of the land which, according to section 7 (2) has to be decided with reference to the stated factors Section 7 provides that the Assistant Commissioner shall determine the highest and the lowest market value of the land in a zone and then the section proceeds to empower him to determine the average market value of the land in a sub-zone To start with, the very concept of ' average market value ' is both vague and irrelevant for the purpose of taxation based on the market value of the land Neither the Act nor the Rules prescribe how the average is to be determined Any average implies a number of known figures and it is impossible to say from what figures, this average is to be determined Further, there is no reason why any land owner should pay a tax based on the average market value even if such a figure can be correctly arrived at, which may be far in excess of the value of his land The provisions relating to determination of the value being arbitrary and farcical, the so-called appeals provided in the Act are meaningless and infructuous An individual land owner can certainly state and prove the market value of his land on any particular date and no land owner can effectively make any case or representation about what is called ' the average market value of a land in a zone ' The factual basis and grievance in respect of the submissions, according to the petitioner, can be appreciated by a scrutiny of the figures which are furnished where the disproportion between the quit rent and the present demand is to be noted as well as the disproportion between the municipal annual valuation and the demand under the Act. So far as the

demands on the petitioner are concerned, they are attacked on the ground that the authorities have determined an imaginary average market value in respect of each sub-zone The petitioner's lands are comprised in sub-zones F (8), F (24) and F (25) of the North Madras ' F ' zone. From enquiries, the petitioner understands as he says, that what the authorities had done was simply to take some of the transactions of sales at a very high rate and fix the average market value for each sub-zone on that basis. The demands have been made on the basis of survey numbers which ultimately have little relevance to the taxation of the type based on the value of the land. The petitioner suggests that the only proper course would be to take each property as a whole which in this case would be each one of the twelve blocks marked in a plan attached to the petition and says that survey and sub-division number has no significance in this connection, as each plot by itself cannot be sold or enjoyed separately The arbitrary nature of the proceedings, according to the petitioner, can be seen when in a number of instances, separate assessments have been made in respect of survey numbers which are part of the same property and where in one or two cases the assessment has been made as a single one on a number of survey numbers including survey numbers not included in that block The assessments are, on the face of the record, so excessive as to be quashed on the ground of being not *bona fide* determinations and for this purpose it will be enough to compare the assessment with the municipal valuation The petitioner further says that the ground-rent lands are held under a tenure from Government in respect of which the ground rent is fixed under detailed rules contained in the Board's Standing Orders based on the value of the land, and the Government which has fixed the value of the land for ground rent purposes cannot itself for another purpose fix a value which is totally out of proportion to that value The petitioner claims that he is entitled to quashing of the assessment under the Act in respect of two items of land held free of assessment, namely, R S. No. 219/1 in Serum Institute Cooks Road and Survey No 219/5 in the same road It is stated that as the lands are held free of assessment, it is incompetent for the State to make a levy on these two items under the Act The so-called tax under the Act is in fact only land revenue in another form and any grant by the State free of assessment would give immunity to the land from being taxed again merely as land whether under the same or other Entry

The respondents in their counter-affidavits deny the validity of the submissions and averments of the petitioners and state that the Act is valid, that the scheme is but to impose a tax on urban land though the measure of tax is determined on its average market value as ascertained in the manner specified in section 7, that the Act is entirely within the ambit of Entry 49 of List II in Schedule VII and is not one falling under Entry 86, List I, that while Entry 86 in List I deals with capitalised value of the assets, Entry 49 of List II is not directly concerned with the capitalised value of the land and buildings, though in a particular piece of legislation, the capital value of the land or building may be taken into account as the basis for levying the tax and that it is open to the State Legislature, while levying tax on urban lands to correlate the tax either to the annual value of such land or to its market value and that the Act in the instant case has adopted the latter as the measure of tax, namely, 0 4 per centum of the average market value of the urban land in a sub-zone. The respondents add that in determining the market value, the authorities are not concerned with the real economic capital value of the land in question but only to find out the market value, apart from its real capital value in its economic sense and that the average market value of the land determined under the Act would not be the same as the capital value of the same land, if it was determined by Parliament for purposes of levying a tax on capital value under Entry 86 of List I. They refute the contention of the petitioners that the basis of the levy of urban land tax is arbitrary and leads to discrimination and that the remedies provided under the Act are meaningless and illusory They point to the provisions of sections 6 and 7, as well as Rule 4, and to the criteria and considerations which would be borne in mind by the relative authorities in classifying zones and sub-zones and determining the average market value of lands in a sub-zone.

The expression ' average,' the respondents would say, has been added to the expression, ' market value ' so as to ignore freak sale, if any, in the sub-zone and as such this is only in favour of the assessee. The respondents in particular refer to section 6 (3) and submit that on its terms there can be no question of inferior land being included in a sub-zone where the average market value of the land is very much more. The respondents have denied also the other grounds of the petitioners for their contention that the provisions of the Act are discriminatory. As regards the contention that the Act contains no provision for determining the correct value of each urban land, the respondents categorically answer that such determination is not necessary because the basis of taxation is the average market value. According to the respondents, a more frequent revision of a final settlement scheme will be administratively impracticable and further such frequent revision will fail to ensure definiteness in the amount of tax payable under the Act. The respondents assert that section 29 is valid and does not offend Article 372 (1) of the Constitution. They also deny that sections 26 and 31 offend Article 19 (1) (*f*) and Article 31 (2) of the Constitution. Entry 49 authorises the State Legislature to levy tax on lands and buildings and this power, according to the respondents, could not be said to have been taken away or exhausted because similar levy has already been in force under a different Act and on a different basis. They further state that the Act provides for levy of tax on the urban lands on a new pattern, that side by side with the property tax levied by the Corporation there was the land tax, and that the urban land tax has only replaced the existing land tax. They would also say that the basis of taxation, the incidence of taxation and the property taxes are not identical in the case of municipal property tax and the urban land tax. The respondents do not admit that there is any legislative history or practice which has the effect of cutting down the wide ambit of the legislative power under Entry 49, List II or that the State Legislature cannot levy under the same Entry two different taxes on the same subject-matter.

Though the pleadings in the various petitions are thus somewhat lengthy and cover elaborate legal contentions and submissions and the arguments before us have been no less prolonged, the questions we are called upon to decide, broadly speaking, fall on the following main heads.

(1) Is the impugned Act within the ambit of Entry 49, List II, Schedule VII of the Constitution? (2) Does the Act contravene Article 14, and (3) Does the Act offend Article 19 (1) (*f*)? We shall deal with these points in that order. But before doing so, we shall first examine the provisions of the Act.

The Madras Urban Land Tax Act, 1963, received, the assent of the President on 25th February, 1964. The Bill had appeared in the *Fort St. George Gazette* (Extraordinary), dated 1st February, 1963. Though the Statement of Objects and Reasons forms no part of the Act, which has to be construed on its own language, the statement is not prohibited from being adverted to by Courts. It stated that the question of rationalisation of the then existing scheme of taxation of land in urban areas so as to secure a return commensurate with the pronounced increase in land values in recent years had been engaging the attention of the Government. Reference was also made to the fact that the Taxation Enquiry Commission and the Planning Commission had been suggesting the need to impose a suitable levy on lands put to non-agricultural use in urban areas and that after the examination of the problem, the Government decided to levy a tax on urban land on the basis of the market value of the land at the rate of 0.4 per centum of the market value. It was proposed to bring the Act into force in the City of Madras with effect from 1st July, 1962 but actually the Act came into force in relation to the City, on 1st July, 1963. The Act may be extended to other municipal towns, townships or any areas within sixteen kilometres of the City of Madras or such municipal towns or townships by a notification of the Government for that purpose. The urban land tax payable in respect of any urban land shall be in lieu of the ryotwari assessment, the assessment levied under the Madras Inams (Amendment) (Assessment) Act, 1956, the ground-rent, the quite-rent, any amount levied under the Madras City Land Revenue Act, 1851 and such other amount as the Government may specify; but the urban

land tax shall be in addition to any other tax on such land payable under any law for the time being in force The object, as mentioned in the Preamble to the Act, is to provide for the levy of tax on urban land in the State of Madras Section 1 relates to the title of the Act and the commencement thereof in the City of Madras and contains power for the Government to extend the Act as aforesaid subject to the condition that any notification in that behalf shall be laid on the table of the Legislative Assembly and shall not be issued unless the draft is approved by the Assembly Section 2 contains definitions. An "assessee" means a person by whom urban land-tax is payable under the Act and includes every other person in respect of whom any proceeding under the Act has been taken for the determination of the urban land tax payable by him The term " occupier " includes any person who for the time being pays or is liable to pay to the owner, rent or any portion of the rent of the urban land or the buildings constructed on it or part of it A "rent-free occupant " is also within the term but which however, does not include a person who is entitled to the kudiwaram in respect of any inam land but in respect of which land any other person is entitled to the melwaram " Owner " is to include a mortgagee in possession and any person who for the time being receives or is entitled to receive whether on his own account or as agent, trustee, guardian, manager, or receiver for another person or for any religious or charitable purposes, the rent or profits of the urban land or of the building constructed on it and also any person who is entitled to the kudiwaram in respect of any inam land A shrotriemdar or any person who is entitled to the melwaram in respect of any inam land and in respect of which any other person is entitled to the kudiwaram is not within the term " owner " For purposes of the definition of ' occupier ' and ' owner ', inam land includes lakhiraj tenures of land and shrotriem land " Urban land " means any land which is used or capable of being used as a building-site and includes garden, grounds, if any, appurtenant to a building but does not include any land which is registered as wet in the revenue account of the Government and used for the cultivation of wet crops There is an *Explanation* to this definition which says that for its purpose any site on which any building has been constructed shall be deemed to be urban land. Then comes section 3 which is the charging section :

" Subject to the other provisions contained in this Act, there shall be levied and collected for every fasli year commencing from the date of the commencement of this Act, a tax on urban land hereinafter referred to as the urban land tax) from every owner of urban land at the rate of 0 4 per centum of the average market value of the urban land in a sub-zone as determined under sub-section (2) of section 7."

Sections 4 and 5 relate to Urban Land-tax Authorities and constitution of Tribunals for purposes of the Act Chapter IV covers preparation of urban land tax settlement scheme. An Assistant Commissioner of Urban Land Tax is appointed by Government by notification with jurisdiction over such area as may be specified in such notification. Section 6 (1) charges him with the duty of classifying the entire area within his jurisdiction into distinct zones and every zone into distinct sub-zones Under sub-section (2), in making such classification, he is to follow the procedure prescribed and have regard to the locality in which urban land is situate, the predominant use to which the urban land is put, that is to say, industrial, commercial or residential, accessibility or proximity to market, dispensary, hospital, railway station, educational institution or Government Offices, availability of civic amenities like water-supply, drainage and lighting and such other mattes as may be prescribed. Sub-section (3) says .

" Subject to the provisions of sub-section (2), in classifying sub-zones under sub-section (1), the Assistant Commissioner shall, as far as practicable, include in a sub-zone urban lands which are contiguous and as nearly as may be of the same market value "

Section 7 (1) directs the Assistant Commissioner to determine the highest and the lowest market value of the urban land in a zone The rest of the section reads :

" (2) Subject to such rules as may be made by the Government, the Assistant Commissioner shall also determine the average market value of the urban land in a sub-zone

(3) The market value under sub-section (1) or the average market value under sub-section (2) shall be determined as on the date of the commencement of this Act and in so determining the Assistant Commissioner shall have regard to the matters specified in clauses (*a*) to (*e*) of sub-section (2) of section 6 "

A draft urban land tax settlement scheme shall be prepared by the Assistant Commissioner which should contain particulars of all zones and sub-zones as classified under section 6, particulars of the average market value of the urban land in each sub-zone as determined under sub-section (2) of section 7 and such other particulars as may be prescribed When this is done under section 8, the draft settlement scheme is forwarded to the Commissioner of Urban Land Tax who after verification is required by section 9 to publish it in the *Fort St. George Gazette* and in such other manner as may be prescribed with a notice stating that objections to the draft shall be preferred within a specified time If there are objections, the Commissioner decides the same after affording a reasonable opportunity of being heard to the objectors and confirms the scheme with or without modification The final settlement scheme is again published in the *Fort St George Gazette* and in such manner as may be prescribed Sections 11, 12 and 13 provide certain limited remedies to aggrieved persons in regard to delimitation of sub-zones and the average market value of urban land in sub-zones as specified in the final settlement scheme. Under section 11, the Board of Revenue, on application by any person aggrieved by the delimitation of any sub-zone in the final settlement scheme, may modify such delimitation and, while doing so, may pass orders including such incidental and consequential orders as may be necessary in respect of the average market value of the sub-zone Any order passed by the Board of Revenue, which is prejudicial to any party, can only be after it has given such party a reasonable opportunity of making his representations Any person aggrieved by the average market value of the urban land in a sub-zone, as specified in the final settlement scheme or as modified under section 12, is given a right of appeal to the Tribunal to be preferred within a specified time. The power of the Tribunal is confined to a determination of the propriety of the average market value of the urban land in a sub-zone as specified in the final settlement scheme But the Tribunal will have no power to alter or modify the delimitation of a zone or a sub-zone as specified in such scheme as settled or modified The Tribunal, while disposing of appeals, should hear all appeals relating to a sub-zone in one batch and make a common order Sections 12 and 14 require the Commissioner to give effect to orders passed under sections 11 and 13 and publish the modifications if any of the final settlement scheme in the manner required or prescribed Once a final settlement scheme is published, it shall remain in force for a period of ten years from the 1st day of July of the fasli year in which the said scheme is published or for a further period not exceeding ten years as the Government may direct After the expiry of the period, the Government may direct revision of the final settlement scheme by going through the procedure under sections 8 to 14 relating to preparation, publication and duration of the final settlement scheme We have then Chapter V relating to preparation of list of assessees The Assistant Commissioner should prepare a provisional list of assessees in his jurisdiction containing particulars of the survey and sub-division number of each urban land in the sub-zone, particulars of the extent of urban land in respect of which each assessee is liable to pay urban land tax, particulars of the names of assessees and such other particulars as may be prescribed The same officer is further required by section 16 to serve on each assessee an extract of such portion of the provisional list as relates to him together with a statement that the assessee shall be liable for payment of urban tax on the basis of the rates specified in the final settlement scheme. In addition, public notice in the prescribed manner should also be given of the provisional list of the assessees Sections 17 and 18 provide for objections to entries in the list or omissions therefrom or otherwise with respect to the list and for consideration and disposal of such objections by the Assistant Commissioner. These orders are subject to revision by the Commissioner under section 19. A list of demand is then to be prepared by the Assistant Commissioner under section 21 (1) It must contain particulars of survey number, sub-division number of the urban land, the extent of urban land liable for tax, names of the assessees, annual amount of urban land tax payable by each assessee under the final settlement scheme and such other particulars as may be prescribed The manner of preparing the list of demand is to be as prescribed A public notice of the demand list should be given under section 21 (3) in the manner prescribed and such notice shall mention the date from

which the list of demand may be inspected On such notice being given, every person claiming to be the owner or occupier of urban land mentioned in the demand including the agent of such person may inspect the list and shall be entitled to obtain a certified extract therefrom on payment of the prescribed fee. Section 22 (1) provides for notice to individual assessees A notice of demand containing such particulars as may be prescribed shall be served every fasli year or part thereof on the owner calling upon him to pay within a period of fifteen days from the date of service of the notice, the urban land tax which has fallen due. If there is default, the tax shall be recovered from the assessee as arrears of land revenue. Sections 23 and 24 provide for power in respect of tax escaping assessment and of refund of excess payment The urban land tax shall under section 25 be a first charge upon the urban land Section 26 provides for recovery of urban land tax from the occupier of the urban land in certain cases. Section 28 requires a survey of urban lands for the purpose of the preparation of the draft settlement scheme, provisional list of assessees and carrying out the other purposes of the Act and the survey so carried out shall be in accordance with the principles contained in the Madras Survey and Boundaries Act, 1923 Certain special provisions are made in Chapter VII. Section 29 provides that the urban land tax payable under the Act shall be in lieu of and in addition to certain taxes. Under section 30, the urban land tax is not to be taken into account for payment of compensation under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963 and the Madras Leaseholds (Abolition and Conversion into Ryotwari) Act, 1963 Where in any case the amount of the urban land tax payable in respect of any land is in excess of the amount of the annual rent payable in respect of such land or the building thereon under the Madras City Tenants' Protection Act, 1921 or the Madras Buildings (Lease and Rent Control) Act, 1960, the Court, authority or officer empowered to fix the rent under any of these Acts may, on application from the owner, add to the annual rent aforesaid, an amount not exceeding the urban land tax payable under the Act This power under section 31 is required to be exercised in accordance with the principles specified by rules made by the Government in that behalf Section 32 makes a certain concession of tax in respect of owner occupied buildings. Under section 33, the Government has power to reduce or remit urban land tax in certain cases Chapter VIII deals with exemptions and Chapter IX contains certain miscellaneous provisions which we need not refer to in detail. Section 47 confers on the Government power to make Rules to carry out the purposes of he Act including certain specified matters

In exercise of the rule making power contained not only in section 47 (1) but also in some of the other provisions of the Act, the Government have framed the Madras Urban Land Tax Rules, 1963. Chapter II of the Rules relates to the preparation of urban land tax settlement scheme. Chapter III relates to the preparation of list of assessees. Chapter IV is concerned with the survey of urban land. Rule 3 (2) says that in making classification of zones under sub-section (1) of section 6 the Assistant Commissioner shall for the purposes of clause (*e*) of sub-section (2) of section 6 have regard to the boundaries of revenue villages or corporation or municipal divisions. Rule 4 deals with determination of market value under section 7 (3) This rule says that in determining the market value of the land, the Assistant Commissioner shall, in addition to the matters specified in clauses (*a*) to (*d*) of sub-section (2) of section 6 have regard to certain other matters which are specified, namely, the prices for which lands have been bought and sold in the zone or sub-zone making due allowancs for the special features, if any, in any individual transaction, the rents fetched for the lands in the zone or sub-zone, the principles generally adopted in valuing lands under the Land Acquisition Act, 1894 and the compensation awarded by the Court in recent land acquisition proceedings after deducting the solatium, if any for compulsory acquisition. The rest of the Rules are matters of detail which do not have to be noticed in the present context.

It may be seen from the provisions of the Act and the Rules we have adverted to, that the Act is intended to levy tax on urban land in the State of Madras, but to

start with in the City of Madras, that the tax is levied on the urban land from its owner and that the liability is computed at the rate of 0 4 per centum of the average market value of the urban land in a sub-zone as determined under sub-section (2) of section 7. The City is divided for the purpose into zones and sub-zones taking into account in making the classification the matters specified by and under the Act While the Assistant Commissioner shall determine the highest and lowest of the market value of the urban land in a zone, he shall also determine the average market value of the urban land in a sub-zone In determining the market value of urban land in a zone, the Assistant Commissioner should keep in view the considerations mentioned in Rule 4 The draft and final settlement schemes set out, among other things, particulars of the average market value of the urban land in each sub-zone but are not required to specify the market value of each urban land brought to tax In fact, there is no provision in the Act for determination of the market value of each urban land on which its owner is called upon to pay tax and there is no indication either in the Act or the Rules how and in what manner, apart from the classification of urban lands, the market value of urban land in a sub-zone is to be determined or arrived at The charging section makes it manifest that the charge is not on the market value of the urban land but only on the average market value of the urban lands in a sub-zone. That this is precisely the case is evident from the other provisions of the Act as well. We shall presently examine more closely the scope, incidence and effect of the levy and their validity when we consider the second question we have already formulated for our decision

We shall now turn to the question of competency of the legislation This will be considered under three sub-heads : (*a*) the true scope and ambit of Entry 49, List II, Schedule VII of the Constitution ; (*b*) whether the Act falls within the purview of Entry 86, List I ; and (*c*) whether the State Legislature, while enacting under Entry 49, List II, is competent to authorise levy of two different taxes on the same subject-matter on two different bases. On the first sub-head, the argument is that Entry 49 should be read with Entry 5, List II and in the light of legislative history and that, if so read, Entry 49 will be seen to be of restricted scope and will enable only levy of tax on lands for the purpose of local authorities usually based on annual rental value of the lands In other words, it is stated, Entry 49 cannot be used for raising general revenue for purposes of the State and it is intended to be confined to raising revenue for purposes of municipal or local bodies In support of this contention, our attention has been invited to certain manuals and reports as to the history and practice relating to the municipal taxation on non-agricultural lands and a few decided cases not all of them directly in point. We may, however, state immediately that in our opinion the contention cannot prevail.

In construing or interpreting a head of authority or power to legislate as under each of the Entries in the Lists, Schedule VII, it will not be right first to explore into the history and practice of prior legislation and then in the light and back-ground of it, read an Entry and then fix its scope and meaning. Under the Constitution, the legislative power is distributed between the Parliament and State Legislatures by specific and express Entries in the three Lists. These Entries contain broad heads of power which should be given the widest amplitude, consistent of course, with the actual language employed in the particular Entry and also the comparative scope of parallel, related or other Entries in each of the Lists. We should remember that the Entries, occurring as they do in so fundamental and such an organic document as the Constitution, which is meant to serve all the ages and apply to all situations, should receive a broad and liberal interpretation and cannot be restricted in scope and amplitude by preconceived or *a priori* reasoning or with reference to external factors. The most direct, proper and reasonable way of construing the Entries is to look at the language itself in each of them, read and understand it in the grammatical and natural sense Where the language itself in each of them, read and understand it in the grammatical and natural sense Where the language of an Entry is clear and unambiguous, it is not, in our opinion, permissible to depart from its plain tenor and scope, and import into it extraneous considerations in order to cut down or restrict its ambit and meaning. In fact, where the language is

express and plain, no problem of construction normally arises. Where, however, there are two parallel or related Entries in the same or different Lists, the apparent conflict will have to find its solution from a harmonious reading of such entries and an attempt at reconciliation for delimiting the mutual scope and ambit of such Entries. If the language *ex facie* is not plain or is ambiguous then naturally the aids of construction will have to be resorted to which will include some times reference to previous history and practice of legislation.

Craies on Statute Law (Sixth Edition) says at page 127:

"It was said by Alderson B in *Gorham* v *Bishop of Exeter*[1], that 'we do not construe Acts of Parliament by reference to history', and Farwell, L J said in a later case (*B V West Riding County Council*[2] 'The mischief sought to be cured by an Act of Parliament must be sought in the Act itself Although it may perhaps be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are exceedingly slight' In *Ewart* v *Ewart*[3], Lord Merriman, P. said: 'The Court in face of the plain words of the statute is not concerned with questions of the public policy which are said to have prevailed before it was passed'."

The same Author proceeds to point out cases where, history as an aid to interpretation, is admissible in certain contexts But these are cases in which the language under interpretation involved ambiguity For instance in *Henrietta* v. *Attorney-General*[4], the Judicial Committee had to decide whether the word "person" in section 24 of the British North America Act, 1867 included a female. The Lord Chancellor, speaking for the Board, observed:

"In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points, *viz* · (i) The external evidence derived from extraneous circumstances such as previous legislation and decided cases, (ii) internal evidence derived from the Act itself"

Applying these tests it was held that the word 'person' included also a female. The Supreme Court in *Gordhandas* v. *Municipal Commissioner*[5], in construing the word "rate" in section 73 (1) (v) of the Bomaby Municipal Boroughs Act, 1925 referred to the meaning given to the word in England and the legislative history and practice in India up to 1925 as an aid. In the majority Judgment it was observed at page 1750.

"Therefore when the first clause of section 73 (1) gives power to the municipality to impose a rate on buildings or lands it meant that kind of tax which had acquired a special meaning and was known as rate in the legislative history and practice of England as well as of India upto then That Legislative history and practice we have considered and it shows that the word 'rate' whenever used upto 1925 with reference to local taxation meant a tax on the annual value of lands and buildings and not a tax on the capital value"

It may be seen that because the word 'rate' in that case had acquired a particular meaning before the Bombay Act was enacted, the previous legislative history and practice was resorted to in order to elucidate and fix the sense in which the Bombay Legislature used the word in the Act. The particular meaning of the word was not obvious and to clear the ambiguity the external aid was applied by the Supreme Court Lord Herschell in a different context in *Bank of England* v. *Vagliano Brothers*[6] stated that the proper course was in the first instance to examine the language of the statute and to ask what was its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment would bear an interpretation in conformity with this view. The Noble Lord added:

"I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code If, for example, a provision be of doubtful import, such resort would be perfectly legitimate Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code I give these as example merely, they, of course, do not exhaust the category What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground"

1 (1850) 5 Ex. 630, 667.
2 L.R. (1906) K B 676, 716.
3 (1958) 3 W L R 680.
4. 58 M L J. 300: A.I.R. 1930 P.C. 120
(121)
5 (1965) 1 S.C J 15 · A.I.R 1963 S.C. 1742
(1750)
6. L.R. (1891) A.C. 107, 144, 145.

This point of view of Lord Herschell clearly, if we may say so, brings out the true principles of interpretation, namely, first we should interpret the language of the statute by reference to such language alone and it is only where there is ambiguity, resort should be had to other aids, external or internal.

Entry 49 in List II is "Taxes on lands and buildings". There is nothing in this plain language to suggest that the power under this head is confined to taxation for municipal or local purposes and does not extend to raising taxes thereunder towards general revenue of the State The Entry is in general terms and the words "taxes" is all pervasive and is not confined to local taxation A tax is a compulsory exaction which is not related to any particular service or as a *quid pro quo*, and is meant for support and purposes of Government or local Government. When these major requisites are satisfied, the impost will be a tax within the meaning of the Entry. The term will obviously not include a fee; in fact a separate Entry is to be found relating to fees in respect of any of the matters in List I or List II, excluding fees taken in any Court. The word 'land' also is of broad import and will include all kinds of lands, open, occupied, agricultural or not, urban lands as well as lands in villages and townships irrespective of the uses to which they will be put. Similarly buildings may mean all kinds of buildings, both residential and non-residential, public and private So then, any imposition or charge, the incidence of which is on lands and buildings, will be within the purview of Entry 49 and, therefore, will be competent for the State Legislature Constitutional limitations and other restrictions under the Constitution on this power will be a different matter. The object of the charge must be land and or building Under the guise of an impost on lands and buildings, an impost on something else in reality cannot of course be supported under Entry 49 But an impost on lands and buildings does not become anytheless so, because the extent of the liability is measured or quantified in terms of certain percentage of their market value or some other yard-stick like acreage or floorage basis. So long as the object of taxation remains to be land or building, the essential character of the charge also remains the same irrespective of the mode or manner or basis adopted for taxing the quantum of liability under the charge or impost. The two things are different, the actual charge with its incidence on something and the basis of its measure or extent We can find no warrant in the language of Entry 49 for the contention that the power is confined to an impost based only on rating value or that the nature of the impost as falling within the purview of the Entry, depends on whether the impost is based on a certain percentage of the annual value as distinguished from the capital value Nor can we find any justification to limit the power under Entry 49 to levy of local taxation In our opinion, therefore, so long as the charge is on lands and buildings, it is a tax within the purview of Entry 49, whatever basis the Legislature may adopt for measuring or quantifying the extent of the charge, whether the basis is a certain percentage of the annual value or the market value of such lands or buildings A tax on land may be based on its productivity, as a tax on buildings on its rating value In that sense land revenue may also be within the purview of Entry 49 but for a separate Entry—Entry 45 relating to that subject of taxation "including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and record of rights, and alienation of revenues"

It is, however, pressed on us that Entry 49 should be read with Entry 5 of List II and that having regard to the legislative history and practice relating to the local taxation, "taxes on lands and buildings" in Entry 49 should be read as taxes on lands and buildings for purposes of local taxation based on annual letting value. In our view, the contention cannot be accepted It is true under delegated legislation in this country local taxation has been generally of a particular pattern The legislative history and practice on this matter has been elaborately referred to in the majority judgment in *Gordhandas* v *Municipal Commissioner*[1] It was observed:

"It will thus be seen that all Indian statutes till 1911 dealing with municipal taxation impose a tax on the annual value of lands or buildings without always using the word 'rate' In some of the

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1. (1965) 1 S.C.J. 15 : A.I.R. 1963 S.C. 1742 (1749).

statutes the word ' rate' is used but the tax is again on the annual value . these Acts which were passed between 1912 and 1925, which repeal the earlier Acts also provide for taxation on lands and buildings, and though the word ' rate' is not used in any of these Acts, the tax is still on the annual value of lands and buildings This shows that there was a uniform legislative history and practice in. India also, though sometimes the impost was called a tax on lands and buildings and at others a rate. But it was always a tax on the annual value of lands and buildings "

In view of this conclusion in the majority judgment, it is needless for ourselves to reiterate the enactments relating to local taxation in various parts of this country from 1797 to 1925 in order to ascertain the said legislative history and practice. Our attention was invited to certain passages in Volume I of the Madras Manual of Administration, Volume I of the Report of the Indian Taxation Enquiry Committee, 1924-25, Volume I (Part I) of the Report of Joint Committee on Indian Constitutional Reform (1933-34) and Volume III of the Report of the Taxation Enquiry Commission, 1953-54 But they do not take us further. One of the learned Judges in *Bhuvaneswariah* v. *State of Mysore*[1], has also mentioned in detail certain references which bear on the legislative history and practice as to local taxation prior to the Constitution. We may take it that local taxation on lands and buildings within municipal areas in this country was levied on the basis of a certain percentage of the annual letting value thereof arrived at from the actual rent or hypothetical rent which included the mode of fixing the annual value at a certain percentage of the capital value. But the question is whether the history and practice control and limit the power of the Legislature to impose tax on lands and buildings, that is, to local taxation of a particular pattern or kind In our view, the answer should clearly be in the negative.

The majority judgment in *Gordhandas* v. *Municipal Commissioner*[2], was dealing with the validity of rule 350-A of the Rules framed in relation to sections 73 and 75 of the Bombay Municipal Boroughs Act, 1925 Section 73 authorised the Municipality to impose for the purposes of the Act, any of the taxes specified therein, the first of which was " a rate on buildings or lands or both situate within the municipal borough ". Section 75 prescribed the procedure to be followed preliminary to imposing any tax under section 73 The section also used the word ' rate ' and the *Explanation* to the section stated that in the case of lands, the basis of valuation might be either capital or annual letting value Rule 350-A provided that the rate on open land should be levied at one per cent of the valuation based on capital " Valuation based on capital " was defined in rule 243 as the capital value of buildings and lands as might be determined from time to time by the valuers of the Municipality The validity of rule 350-A was impugned on the ground that the word "rate" used in section 73 (1) (i) had acquired a special meaning by the time the Act came to be enacted and the tax should be on the annual value of the lands or buildings and not on the capital value and this ground prevailed in the Supreme Court. On the view that the word ' rate ' having regard to the legislative history and practice both in England and India had acquired a special meaning, namely, a tax on the annual value of the lands and buildings and not on their capital value, the majority judgment did not have to deal with the question whether it would be incompetent for the State Legislature to expressly provide for local taxation on lands and buildings on the basis of capital value or to levy a tax on lands and buildings on the basis of a certain percentage of their market value for the purpose of general revenues. The decision entirely proceeded on the special meaning, the word ' rate ' used in the Bombay Act had acquired in the English and Indian Legislative History and Practice prior to its enactment. In addition to the legislative history and practice in England, the majority judgment also noticed that in England the land tax, which was levied for the first time by the Land Tax Act, 1797 and which was a charge on land to be borne by the owner and not on the income likely to arise from occupation of the land, existed independently of and side by side with the rates on lands and buildings for municipal purposes If we may say so, in fact the Supreme Court recognised at page 1749 .

"The matter might have been different if the words in clause (i) of that section (section 73 (1)), were ' a tax on buildings or lands or both situate within the municipal borough' for then the word

1. A.I R. 1965 Mys. 170. 3. (1965) 1 S.C J 15 : A.I.R. 1963 S.C. 1742

'tax' would have a wide meaning and would not be confined to any special meaning But the use of the word 'rate' in clause (1) definitely means that it was that particular kind of tax which in legislative history and practice was known as a 'rate' which the municipality could impose and not any other kind of tax"

Clearly, therefore, *Gordhandas* v *Municipal Commissioner*[1] is not of assistance to the petitioner's contention that Entry 49 should be read in a restricted sense limited to local taxation on lands and buildings based on annual rating value

On the other hand, the previous history of the power to tax on lands and buildings leads us to the conclusion that Entry 49 is intended to be comprehensive in its scope and not restricted as contended for by the petitioners Under the Scheduled Taxes Rules framed under section 80-A (3) (*a*), Government of India Act, 1919, the Legislative Council of a Province was given power to make, without the previous sanction of the Governor-General, any law imposing or authorising any local authority to impose for the purpose of such local authority any tax included in Schedule II to the Rules Likewise, the Council could make a law imposing for the purpose of the Local Government any tax included in Schedule I as "tax on land put to use other than agricultural" In Schedule II, item 2 is "tax on land or land values" and item 3 reads "a tax on buildings" Item 11 in Schedule II relates to a tax imposed in return for service rendered such as, water rate, lighting rate, scavenging, sanitary or sewage rate, drainage rate and under this item is also included fee for the use of markets and other public conveniences What is to be particularly observed from the Scheduled Taxes Rules is that powers were conferred separately on the Legislative Council, one for making a law imposing a tax on land put to non-agricultural use which was for purposes of Government, that is to say, Provincial purposes and the other to make a law authorising any local authority to impose, for purposes of such local authority, a tax on land or land values or on buildings It follows, therefore, that under the Scheduled Taxes Rules, the Legislative Council was competent to make a law imposing a tax on land put to non-agricultural use for purposes of the general revenue of the Provincial Government then called the Local Government, a power distinct and separate, as we said, from the other power restricted to imposition of tax for purposes of local authority The Joint Committee on Indian Constitutional Reform, 1933-34 had originally proposed enumeration of various topics of power distributed between the Federation and the Provinces and each List at the end contained an entry relating to power to levy taxes, fees, etc, in connection with the subjects in each List. Later revised Lists were suggested in which subjects were enumerated separately from the heads of power to impose taxes—Vide *Sundararamier & Co* v *State of Andhra Pradesh*[2] Item 8 in the Annexure to List II recommended by the Committee was "Taxes on lands and buildings, animals, boats, hearths and windows, sumptuary taxes and taxes on luxuries" There was no mention in the Annexure of any power relating to land revenue In the Government of India Act, 1935 the scheme of separate enumeration of subjects of power and taxing power was adopted and Item 42 in List II relating to the Provinces was "Taxes on lands and buildings, hearths and windows". Item 39 in this List related to "land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights and alienation of revenue". We may thus observe that in List II, Item 42 consolidated under one head the power to levy tax on lands and buildings, hearths and windows without making any distinction as to its use for purposes of Provincial Governments or local authorities unlike under the devolution rules we referred to What were distinct powers of the Legislative Council under the Scheduled Taxes Rules, one enabling the Council to impose taxes for purposes of Local Government and the other to impose or authorise the local authority to impose for the purpose of such local authority "taxes on lands and buildings" were merged into a single head of power under Item 42 of List II in the 1935 Act. It would follow, therefore, that it will be quite incorrect to limit Item 42 in List II of that Act to local taxation Entry 49 of List II in the Constitution is much the

1 (1965) 2 S C J 15 A I R 1963 S C. 1742 459 : (1958) 1 An W.R. (S.C.) 179.
2. (1958) 1 M.L J (S C) 179 . 1958 S C J.

same as Item 42 of List II in 1935 Act except in the former the words "hearths and windows" have been omitted In our opinion, therefore, we cannot uphold the contention that Entry 49 in List II of the Constitution should be given a restricted interpretation and confined to local taxation based on annual value We hold that the power under that Entry is compehensive and complete to impose a tax on lands and buildings either for purposes of general revenue or local bodies, including Municipalities and it is quite open to the Legislature, in exercise of its power, to pick and choose, subject of course to constitutional restrictions and limitations, a convenient mode or basis of fixing the extent or quantum of liability under the charge

That takes us to the second sub-head as to whether the impugned Act falls within or trenches on Entry 86 of List I Entry 86 relates to "Taxes on the capital value of the assets, exclusive of agricultural land, individuals and companies , taxes on the capital of companies". The argument for the petitioners is that the impugned Act in effect levies a tax on capital value of the urban land and is, therefore, a law which falls within the ambit of Entry 86 of List I and necessarily, therefore, outside the ambit of Entry 49 of List II. The argument is also put in a different way, namely, Entries 49 and 86 in the two Lists, read harmoniously and in the light of each other, would exclude from the scope of the former Entry a tax on land based on its market or capital value In our opinion, the two Entries are distinct and different from each other and do not either overlap or stand to any extent on a field common to both, so as to call for a reconciliation between conflicting areas of power and restricting the scope of one entry in order to define the limit of and give full effect to the other power. No doubt, in order to appreciate the scope of a particular Entry the whole scheme of distribution of legislative power between the Union and the States should be looked into on a comparative and contrast basis In doing so, full scope and effect must be given to each Entry in the organic statute and that construction most beneficial to the widest possible amplitude of each of the enumerated powers should be applied The cardinal rule of interpretation of the Entries, as of any statute, is that the grammatical and ordinary sense of the words is to be adhered to unless that course would lead to absurdity, repugnancy or inconsistency In such a case, the grammatical and ordinary sense of the words must give way to a restricted or legalistic meaning to be decided by Courts. Once the scope of legislative power under an enumerated head in the Lists is fixed, the question of competence of a legislation is approached with reference to the pith and substance doctrine That is to say, in deciding whether a particular statute falls and does not fall within the ambit of a given head of power, we should find out the pith and substance or the purpose or the object of the legislation. The true intention and purpose of a legislation can also be determined from its legal effect. These principles are so well settled that scarcely any authority need be cited in support

We have already dealt with the scope of Entry 49. The charge under the Entry is on the land or building ; the incidence is on them, and lands and buildings are the subject-matter of the charge We have already pointed out how the fixation or the mode or basis of fixation of the extent of liability under the charge is a matter independent of the charge itself and is but incidental or ancillary to it The tax under Entry 86, List I of the Constitution is on the capital value of the assets of individuals and companies or on the capital of companies This is not a tax on the asset itself but on its capital value which, as we think, means its real economic value. That again implies net value of the assets, for, if the assets are encumbered, *pro tanto* they cease to be assets In ascertaining the capital value or the economic value of the assets, therefore, deductions will necessarily have to be allowed of the value of encumbrance on such assets Further the tax under Entry 86 falls on the owner of the assets which is clear from the words used "of individuals and companies", and not occupiers. In some decided cases, the view has been expressed that the subject-matter of taxes under Entry 86 is the value of the totality of the assets In our opinion, if we may say so with respect, that is the correct view to take. We are not persuaded by the contention that because under the General Clauses Act plural includes singular, even one of the assets of an individual can be taxed on its capital value under the Entry. The economic value of the assets of an individual is not

and cannot be the same as the economic value of one of the assets of an individual. The economic value of the assets of an individual can possibly be determined only on a consideration of the total position of the rights and liabilities in relation to the total assets, and the economic value of one of the assets cannot serve the purpose It may be that a law made under Entry 86 to tax the capital value of the assets of individuals may single out one of the assets for an additional levy as under the Finance Act, 1965, but that does not detract from the point These observations relating to Entry 86 clearly bring out the distinction and difference between this Entry and Entry 49 The import Under Entry 49 is on the land, and need not necessarily be from its owner but may be from the occupier thereof, the impost under Entry 86 is not on the assets themselves of an individual but on their economic value, that is to say, their real value as reduced by the value of encumbrances thereon and is on the owner of the assets. In other words, the tax under Entry 86 is on the net economic value of the totality of the assets The assessee under Entry 86 must be the owner or his representative An occupier of assets of an individual cannot be taxed under Entry 86. Nor can the tax under that Entry be based on part only of the assets of an individual. The term "assets" in the context cannot be read in that sense. As a matter of fact, the Wealth-tax Act, 1957 by section 3 of the Act imposes a wealth-tax and says that there shall be charged for every assessment year a tax in respect of the "net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule". The Act contains provisions how to determine the net wealth which provide for deductions of certain liabilities on the assets As is seen from the Schedule to the Act, wealth-tax is computed on a progressive rate depending on the quantum of net wealth on slab basis.

Sir Byramjee v *Province of Bombay*[1], decided that the Urban Immovable Property Tax levied on buildings and lands by section 22 forming part of Part 6, Bombay Finance Act, at ten per cent of the annual letting value of such buildings and lands was not a tax on income or on capital value of lands and buildings and Part 6, Bombay Finance Act, 1932 was not, therefore, *ultra vires* the Provincial Legislature. Beaumont, C J, while observing that the tax impugned there, was tax on lands and buildings within Item 42 of the Provincial List in the Government of India Act, 1935 expressed the view that it was not a tax on income within Item 54 of the Federal List or a tax on the capital value of the assets within Item 55 of that List. It is on the view that the basis of quantifying the tax, namely, annual letting value did not convert the tax into one on income and that the tax itself was imposed without any relation to the capital value except so far as such value could be ascertained with reference to rateable value Broomfield, J, said at page 71:

> "What is meant by the capital value of assets in that item (item 55) is by no means clear. .. It may be that what is intended is a tax on the total value of assets in the nature of a capital levy In any case the measure of the capital value of assets would appear to be the market price. That would obviously be affected by several factors, e g mortgages and charges, of which the impugned tax takes no account"

Kania, J, as he then was, dealing with the question whether the tax was on the lands and buildings or on the income of the lands and buildings considered at page 74;

> "If lands and buildings are treated as investments and the return, as income, is taxed it is a tax on the income On the other hand, if the tax is on the lands and buildings themselves and the assessment is on a standard named by the Legislature which may fluctuate or vary on the produce or income from it, it would be a tax on the property As has been pointed out in In re *A reference under the Goernment of Ireland Act*, 1920 [2] the measure of the tax is not itself the test In determining the nature of the tax consideration may be given to the standard on which the tax is levied, but that is not the determining factor"

One of the learned Judges thus thought that Item 55 of the Federal List related to a tax on the total net value of the assets in the nature of a capital levy The Court was also of the view that the measure of tax is not a deteminmg factor but the test would be whether the tax was on lands and buildings or on the income as such.

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1. A I R 1940 Bom 65. 2. L.R (1936) A C 352.

Raha Ram v *The Province of East Punjab*[1], was concerned with the Punjab Urban Immovable Property Tax Act which levied an annual tax on buildings and lands situated in the rating areas at a certain rate in per centum of the annual value of such buildings and lands Then it was provided that the tax should be paid by the owner of the buildings and lands It was held that the tax levied by the Act was in pith and substance " a tax on land and buildings " covered by Item 42 of the Provincial List in the Government of India Act, 1935 and not a tax on income within the meaning of Item 54 of the Federal List Fazl Ali, J , observed :

> " It is true that the annual value was used as the basis, but it was very different from the annual value which may be used for getting at the true profits or income The annual value, as has been pointed out, is at best only notional or hypothetical income and not the actual income It is only a standard used in the Income-tax Act getting at income, but that is not enough to bar the use of the same standard for assessing a Provincial tax If a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax without intending to tax income "

In *J N Duggan* v *I T Commissioner, Bombay City*[2], Chagla, C J , held somewhat a different view that if the Legislature could impose a tax on all the assets of an individual it could not be assumed that the Legislature could not do something much less than that, namely, impose a tax only on some assets and not on the full value but on a value arrived at after some deductions and proceeded to say :

> " Now, lands and buildings would undoubtedly be assets But whereas the Provincial Legislature is competent to impose a tax one ands and buildings, the Central Legislature is empowered under Entry 55 of List I to impose a tax not on lands and buildings as such but on the capitalised value of lands and buildings Therefore, the power of the Provincial Legislature is restricted to tax on lands and buildings without taking into consideration the capital value of lands and buildings "

This view was dissented from by *Municipal Corporation, Ahmedabad* v. *Gordhandas*[3] on both the points Gajendragadkar, J , as he then was, said

> " With very great respect, I am unable to agree with this last observation . As I have already pointed out, I have come to the conclusion that even if the capital value of lands is taken into consideration by the Municipal Corporation in determining the amount of tax to be levied on the open land, the tax does not become a tax on the capital value of the assets "

The actual decision upholding the validity of rule 350-A framed under the Bombay Municipal Boroughs Act, 1925 was no doubt reversed by the Supreme Court in *Gordhandas* v *Municipal Commissioner*[4], but that was on the ground of the special meaning which the word ' rate ' had acquired in the context of local taxation The principle laid down by the Bombay High Court that the character of the means and machinery devised by the Legislature for levying a tax would not by itself determine the character of the tax as such is however left unaffected The Bombay High Court pointed out that one must examine the essential features of the tax and consider the pith and substance of the legislation before deciding whether it is a tax on land as such or it imposes a tax on the capital value of the assets consisting of the lands U P Large Land Holdings Tax Act, 1957 by section 3 provided for levy on the annual value of each land holding of a tax at the rates specified in the Schedule to the Act The Allahabad High Court in *Oudh Sugar Mills* v *State of U P*[5] upheld the validity of that levy observing that the mere fact that the tax was calculated on the annual value of the lands and the rate was applied on progressive scale did not make the tax any the less a tax on the land The learned Judges held the view

> " The scope of Entry No 49 is wide enough to include a capital levy on agricultural land Even a tax on the capitalised value of non-agricultural land would fall under Entry No 49 of List II and not under Entry No 86 of List I of the Seventh Schedule It is permissible to restrict the meaning of the word ' assets ' in Entry No 86 by excluding land, both agricultural, as well as non-agricultural, from its ambit in order to give full scope to the expression ' Taxes on land' occurring in Entry No 49 of List II "

With respect, we feel that we cannot go as far as that and justifiably exclude the non-agricultural land from the purview of Entry 86 especially when the framers of the Constitution when putting in Entry 86 had applied their minds as to what

1 (1949) 1 M L J 213 (1949) F L J 8 1948 F C R 207, 224
2. A.I.R. 1952 Bom 261, 262
3 A I R 1954 Bom 188, 184
4 (1965) 2 S C J 15
5 A I R 1960 All 136.

should be excluded from that Entry and provided for exclusion of agricultural lands. On our construction of Entry 49 in the State List, the question of exclusion from Entry 86 of the Union List of non-agricultural lands does not arise In any case, no argument was addressed to us on those lines In *Jagannath Baksh Singh* v *State of U P* [1], which was on appeal from *Oudh Sugar Mills* v *State of U P* [2], the Supreme Court did not go in to the question of the ambit of Entry 86 but upheld the validity of the legislation as falling within the purview of Entry 49 of List II and not violative of Article 14 or Article 19 (1) (*f*) of the Constitution In the dissenting judgment of Sarkar, J , as he then was, in *Gordhandas* v *Municipal Commissioner* [3], the relative scope of Item 42 of the Provincial List and Item 55 of the Federal List in the Government of India Act, 1935 was touched upon and it was observed :

> " The Provincial Legislature had been given the power to tax units of lands and buildings irrespective of their value and the Central Legislature the power to tax the value of assets "

Indication is to be found in this judgment that by value of assets is meant the net economic value of the totality of the assets and that further under Item 55 the levy could be only on the individual owning the assets and the tax could not be recovered from the occupier of the assets or any part thereof

The preponderance of judicial opinion is, therefore, in favour of the construction that Entry 86 of List I of the Constitution occupies a field quite different from that of Entry 49 in List II of the Constitution and relates to a charge on the net economic value of the totality of assets belonging to an individual and that the levy can be collected only from the owner of the assets On the other hand, Entry 49, List II is concerned with imposition of taxes on lands and buildings *qua* lands and buildings irrespective of their economic value and the levy is not necessarily on the owner but the incidence may be on the occupier So long as the object of taxation is land or building, the measure of tax would make no difference to the incidence of tax on such land or building The measure may be on the basis of annual letting value or gross market value of the lands or buildings or some other factor like acreage or floorage space or even the user to which the lands and the buildings may be put. The choice of the particular basis or machinery is entirely within the discretion of the Legislature, as a matter incidental or ancillary to power to levy tax on lands and buildings The machinery, measure or basis of computing or quantifying the extent of liability under the charge on lands or buildings is a matter different from the charge itself and the two cannot be mistaken as synonymous to each other, just as the end and the means are not one and the same thing The real test is where the incidence of the charge or impost falls and not how the liability is calculated, though the latter is also a relevant consideration It was on this basis local taxation on lands and buildings on the basis of their annual letting value was held to be not income-tax It was on a parallel reasoning again profession tax has been held to be not income-tax—Vide *C Rajagopalachari* v *Corporation of Madras* [4]

The pith and substance of the Madras Urban Land Tax Act is that for the purposes of general revenue of the State it imposes a tax on urban lands, first, within the limits of the City of Madras and with a power for the State to apply the Act to other areas The subject of imposition under the charging section is clearly the urban land *qua* land and the tax is collected from the owner of such urban land ' Owner ' is defined, as we already mentioned, to include an occupier and also a mortgagee, in possession, receiver, trustee, guardian and manager. The term ' occupier ' is also defined in the Act as one who is liable to pay rent to the owner as defined The tax is of course to be computed at the rate of 0 4 per centum of the average market value of the urban land in a sub-zone This does not mean that the subject of charge is the average market value The average market value of the urban land is only the basis for computation of the extent of the liability under the charge which is always on the urban land The charge is thus entirely in accord with the object of the Act declared in the Preamble, namely, to provide levy of tax on the urban land in the City of Madras A perusal of the rest of the provisions

1 A I R 1962 S C 1563
2 A I R 1960 All 136.
3 (1965) 2 S C J 15.
4 (1964) 2 S C J 234

of the Act shows that, in determining the average market value of the urban land, allowance is not made for any charge or encumbrance on such land The basis of computation is not related to the net economic value of the urban land Further, as we said, the tax as may be seen from section 26 can be recovered from the occupier of urban land Section 29 makes it clear that urban land tax is in lieu of the ryotwati assessment, ground rent, quit rent and other amounts specified in the section and in addition to any other tax on such land payable under any law for the time being in force Having regard to these features, we are clearly of opinion that the Madras Urban Land Tax Act squarely falls within the ambit of Entry 49 of the State List and does not, to any extent, or in any manner trench on Entry 86 of the Union List

Another argument for some of the petitioners is that it is not competent for the State Legislature, acting under Entry 49, to levy two taxes on different bases which may even be conflicting with each other What is meant is the local taxation on lands and buildings under enactments relating to local bodies including the City Corporation, Municipalities and Panchayats in the State is on the basis of certain percentage of the annual letting value actual or hypothetical and the urban land tax under the impugned Act is not levied on the same basis but on the basis of a certain percentage of the average market value of such land Both enactments being under Entry 49 of the State List or the corresponding power under the earlier Constitutions, the State Legislature will not be competent to levy two taxes on the same subject on two different bases It may be permissible, according to the argument, to raise additional revenue by way of a charge but not by an independent Act and by a separate impost measured undoubtedly on a different basis We must confess we have not been able to fully appreciate the argument; nor is any direct authority cited in support of it. As we have already held, Entry 49 of the State List is not confined to levy or authorise the levy of impost on land and building for local or municipal purposes but also comprehends such levy for the purpose of the general revenue of the State. That being the case, we can find no objection to the competency of the State Legislature to make the impugned Act The enactments authorising the local taxation on lands and the impugned Act serve different purposes, though both have been enacted by the Legislature acting under the same head of power We are not persuaded, therefore, that the Madras Urban Land Tax Act is incompetent on this ground either. We hold on the first ground of the petitioners that this Act is within the purview of Entry 49 of the State List and does not trench on Entry 86 of the Union List and is entirely within the competence of the State Legislature.

We pass on to the second and more substantial ground urged by the petitioners, namely, that the Act is arbitrary, unequal in its incidence and offends Article 14 of the Constitution That the fundamental rights in Part III of the Constitution apply to tax laws is now beyond question Article 265 of the Constitution declares that no tax shall be levied or collected except by authority of law The law that is referred to in the Article is also covered by Article 13 which attracts to it the rights conferred by Part III Any law made in contravention of those rights shall, to the extent of the contravention, be void Tax laws should, therefore, not only answer the test of legislative competency but should satisfy that they are not in contravention of the fundamental rights of which equality is clearly one It will suffice to refer to *Jagannath Baksh Singh* v *State of U P* [1], where it was held .

" In recent years, there has been a consensus of opinion in the decisions of this Court that the validity of the legislation imposing a tax can be challenged not only on the ground of lack or absence of legislative competence but also on the ground that the impugned legislation violates the fundamental rights guaranteed by Part III of the Constitution vide *Mohammad Yasin* v *Town Area Committee* [2], *State of Bombay* v *United Motors (India) Ltd* [3], *Bengal Immunity Co , Ltd* v *State of Bihar* [4], *Tika Ramji* v. *State of Uttar Pradesh* [5] and *Balaji* v *Income-tax Officer* [6] Therefore, it must now be taken to be settled that the validity of a tax law can be challenged on the ground that it infringes one or the

1 A I R 1962 S C 1563, 1570
2 (1955) S C J 152 (1952) S C R 572
3 (1953) S C J 373 (1953) 1 M L J 743 (1953) S C R. 1069.
4 (1955) S C J 672 · (1955) 2 M L J (S C) 168 · (1955) 2 S C R 603
5 (1956) S C J 625 (1956) S C R 393.
6. (1961) 1 S C J 376.

other of the fundamental rights guaranteed by Part III, and so, the argument that the tax with which we are concerned is invalid because it offends against Articles 14 and 19 (1) (*f*) cannot be rejected as inadmissible "

We shall, therefore, proceed to consider if the impugned Act offends Article 14 of the Constitution

In the decision of the Supreme Court just referred to by us it was also pointed out when a taxing statute could be held to contravene Article 14, namely, "if it purports to impose on the same class of property similarly situated an incidence of taxation which leads to obvious inequality". The Supreme Court in *K T. Moopil Nair* v *State of Kerala*[1], struck down the Travancore-Cochin Land Tax Act, 1955 as violative of Article 14 That Act was passed by the Kerala State Legislature to provide for the levy of a low and uniform rate of basic tax on all lands in Travancore-Cochin The charging section 4 stated that there should be charged and levied in respect of all lands in the State, of whatever description and held under whatever tenure, a uniform rate of tax called the basic tax The next section as amended fixed the rate at Rs 2 per acre and the basic tax so charged and levied at that rate was to be in lieu of any existing tax in respect of land The Supreme Court referred to the principle,

"But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property "

and dealt with the question whether the Act violated Article 14 Finding that the Act in imposing a flat rate of tax on acreage basis was without reference to income from the land, either actual or potential, and, therefore, it obliged every person, who held land, to pay the tax at the flat rate whether or not he made any income out of the property or whether or not the property was capable of yielding any income, the Supreme Court held that inequality was writ large on the Act and was inherent in the very provisions of the taxing section. The Court observed at page 558

"It is also clear that there is no attempt at classification in the provisions of the Act Hence no more need be said as to what could have been the basis for a valid classification It is one of those cases where the lack of classification creates inequality It is, therefore, clearly hit by the prohibition to deny equality before the law contained in Article 14 of the Constitution "

Again the Mysore Buildings Tax Act, 1963 provided for levy of a tax on buildings on floorage basis One of the learned Judges with whom the other concurred on this point in *Bhuvaneswariah* v *State of Mysore*[2], held that such basis was unscientific, arbitrary and mechanical and that under that basis the incidence of tax fell unevenly on things similar The Act was struck down as being in contravention of Article 14. Likewise the Kerala High Court in *N Kunhali Haji* v *State of Kerala*[3], struck down the Kerala Buildings Tax Act, 1961 on the ground of lack of classification resulting in inequality, as this Act also imposed a tax on buildings on the basis of floor area of buildings

What is the position under the Madras Urban Land Tax Act? It is contended for the petitioners that the Act totally lacks any classification resulting in unequal incidence and distribution of tax We are of the view that the contention is clearly one of substance We have already referred to the main provisions of the Act The purpose of the Act is to raise tax to add to the general revenues The tax, as we said, is on urban land and is levied from every owner as defined in the Act The charging section expressly adopts the average market value of the urban land in a sub-zone as determined under sub-section (2) of section 7 as the basis for determination of the extent of liability to tax on the urban land. The rate of tax is fixed at 0 4 per centum of the average market value of the urban land. The very expression "the average market value" demonstrates that it is not the actual market value of the urban land which is taxed, that is taken as the basis for fixing the extent of liability to tax and pre-supposes that it is the mean of uneven figures representing market values, that forms the basis for measure of the tax. The word

1 (1961) 2 S C J 269 · A I.R 1951 S C. 552 (557).
2. A I R. 1965 Mys 170
3. A I R. 1966 Ker. 14.

'average' as a verb means to estimate by dividing the aggregate of a series by the number of its units, and as an adjective it means equal to what would be the result of taking an average. See the Shorter Oxford English Dictionary So the phrase "average market value of the urban land" definitely conveys the idea of the arithmetic mean of a series of market values If, for instance, a sub-zone consists of two pieces of urban lands owned by two different persons and the market value of one of which is Rs 10,000 per ground and the other Rs 5,000 per ground, the average market value is arrived at by adding the two figures and dividing the total by two. The result is that the average market value per ground in the sub-zone will be Rs. 7,500 per ground If the rate of 0 4 per centum of the average market value is applied, the burden of incidence of tax on the land whose market value is Rs 5,000 is obviously heavier on the basis of the higher average market value and the burden is less for the other piece of land whose market value is higher than the average market value The burden which is unrelated to the market value thus falls unequally upon lands and consequently on their owners or occupiers Urban lands in the same sub-zone are made to bear unequal burden, unequal in the sense that the burden is not related to the market value of each urban land but on the average market value applied to it Urban land of lesser market value has to pay a heavier tax than similar land but of higher value which bears on account of the averaging with the other land, a lower tax. We have not been able to see why the Legislature has resorted to this system of averaging the market prices of lands for purposes of applying the rate of tax If the tax is intended to add to the general revenues, we fail to see how this inequality in the incidence of tax is related to that purpose of taxation It is of course open to the Legislature to make such classification, as it chooses for purposes of taxation, and apply rates of taxation, but this liberty is subject to the limitation of equal protection afforded by Article 14 of the Constitution There is here in the charging section a total lack of classification of urban lands according to their market values and correlating and applying the rate of tax to such market value The result is, by adopting the basis of average market value for the urban land for fixing the quantum of tax, inequality in the incidence and distribution of tax is brought about This inequlity is so patent *ex facie* the charging section.

It is true that sub-section (3) of section 6 says that subject to the provisions of sub-section (2), in classifying sub-zones under sub-section (1), the Assistant Commissioner shall, as far as practicable, include in a sub-zone urban lands which are contiguous and as nearly as may be of the same market value In our opinion, this sub-section hardly serves to remove the inequality in the incidence of tax The Assistant Commissioner is not obliged in every case to put into a sub-zone urban lands of equal market value The sub-section uses phrases like "as far as practicable" and "as nearly as may be of the same market value" and is not designed to make a departure from the basis of average market value of urban lands for fixing the quantum of tax a particular urban land should bear, and to adopt the market value as the basis Indeed that the Act does not intend a levy on urban land on the basis of its market value is quite obvious from the fact that nowhere it provides for determination of the market value of the urban land of each owner in a sub-zone On the other hand, in the counter-affidavit filed on behalf of the respondents, the stand has been taken that no such determination of the market value of each urban land is necessary for purposes of levy of urban land tax under the Act Our attention has also been invited by the petitioners to the proceedings of the Commissioner of Urban Land Tax dated 23rd September, 1965, relating to W P. No. 3386 of 1965 in which the Officer said .

"A distinctive treatment of lands comprised within a sub-zone is not called for The lands included in a sub-zone have to be taken as a whole when once they have been delimited into a sub-zone and the valuation fixed"

and to a further order of this officer dated 8th September, 1965, in which he expressed himself even more explicitly .

"The contention that the value should be fixed on the basis of the value of each land individually and not on the basis of the average of the lands in a sub-zone is not supported by statutory provisions.

Sub-section (2) of section 7 lays down that the Assistant Commissioner shall determine the average market value of the urban lands in a sub-zone What is not provided for under the Act cannot be done as suggested by the petitioner"

It is not contended for the respondents that this view of the Officer as to the effect of the provisions of the Act is wrong We think that the Commissioner of Urban Land Tax correctly understood the provisions of the Act as not providing for and authorising the Assistant Commissioner to determine the market value of the urban land of each owner and to make it the basis for fixing the extent of the liability to tax In our opinion, therefore, section 3 of the Act clearly denies to owners of urban lands equal protection by a total lack of classification on the basis of market value of such lands and by imposing unequal burden on them, and violates Article 14 of the Constitution The Act does not give the necessary criteria relevant to imposition of tax on the urban land of a particular assessee and in a sense the charging section is also vague and ambiguous as to the measure of tax The charge is not on the basis of indicia or factors which relate to the particular land of an assessee but on considerations extraneous thereto, namely, those relevant to other lands of other assessees Further in actual working of the provisions of the Act, the ultimate measure of tax will depend upon how the Assistant Commissioner may classify zones and sub-zones and arrive at average market value Sections 6 and 7 do not furnish proper criteria and serve as a definite guide in the light of which the Assistant Commissioner may act in the matter of classification of zones and sub-zones and determining the average market value How is the Assistant Commissioner to find out the average market value of lands in a sub-zone without fixing the market value of each of the lands in the sub-zone is not clear, nor is it clear from sections 6 and 7 whether the Assistant Commissioner is to determine the market value for purposes of sub-section (3) of section 6 and then to proceed to make the classification or whether he is to classify the lands first as zones and sub-zones and then to determine the average market value The two sections are somewhat vague and do not provide definite guidance in the matter of classification of zones and sub-zones in deciding the average market value In view of the fact, therefore, that the charging section contravenes Article 14 of the Constitution and sections 6 and 7 do not furnish proper and definite guidance in the matter of classification of zones and sub-zones and determination of the average market value of urban lands in a sub-zone, they must be struck down as unconstitutional Without the charging section, the rest of the Act cannot independently exist and operate We, therefore, declare the entire Act to be void and unenforceable On this view, it is unnecessary to consider the validity of certain other provisions of the Act

Our attention was invited to the Urban Land Tax Schemes prepared in relation to Perambur, Triplicane, Mylapore and Mount Road areas and it was contended for some of the petitioners that they demonstrated the arbitrary character of the determination of the average market value and the resulting inequality in the incidence of tax On that ground, we were called upon to quash the Urban Land Tax Schemes involved in the petitions and demands made under the Act for payment of tax But on the view we have taken on the validity of the Act, no separate consideration of the validity of the schemes is necessary because those schemes and demands cannot stand without the Act

Lastly we come to the argument based on Article 19 (1) (*f*) of the Constitution which, however, has not been developed at any length before us apparently because of the view taken by the Supreme Court in certain cases on the effect of the Presidential Orders suspending the operation of Article 19 (1) (*f*) during the currency of emergency Mr V K Thiruvenkatachari for some of the petitioners suggested that the view of the Supreme Court may require reconsideration for some reasons He submits that Article 358 of the Constitution should be construed as having only a limited scope by reason of its place in the Chapter on "Emergency Provisions" in the Constitution According to him, it is only emergency legislation expressly so designed by the Legislature that will be saved from the purview of Article 19 and the ban under that Article will operate in respect of other laws, as it will, in relation to pre-proclamation laws. On this view, learned Counsel says, Article 19 would

also in respect of such laws be subject to Presidential Orders under Article 359 and that Article 358 deals with executive action as regards action under laws validated thereby On this matter, he invites our attention to an article of his which appears in (1956) 1 S C J (Journal) 1 As the argument was not pursued beyond mentioning it, we express no opinion on it There is one other matter which we may advert to In some of the petitions in which Mr V K Thiruvenkatachari appears, the petitioner is an incorporated company It is now well settled that such a company will not be a citizen and, therefore, cannot invoke Article 19 in its aid But the argument is that though it is a company which cannot invoke that Article, if an Act at the instance of a citizen is held to contravene Article 19, then by reason of Article 14, the Act cannot be applied to such companies alone Here again we express no opinion on this question since we have not dealt with Article 19 in relation to the impugned Act

On our view that the impugned Act contravenes Article 14 of the Constitution and is void, the petitioners must succeed The petitions are allowed and the rules *nisi* in them are made absolute. The petitioners in W P Nos 2191 of 1965 and 1614 of 1964 will be entitled to costs with Counsel's fees in each of the petitions fixed at Rs. 250. There will be no order as to costs in the rest of the petitions

V.K. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction)

PRESENT :—MR. P. CHANDRA REDDY, *Chief Justice* AND MR. JUSTICE M NATESAN.

Tamizhazhagan and another .. *Appellants**

v.

The Revenue Divisional Officer, Namakkal, Salem District and others . *Respondents*

Madras Prevention of Insults to National Honour Act (XIV of 1957) section 5—Competency of State Legislature to enact—If falls within Entry 1 of List III or Entry 97 read with Entry 93 of List I of Schedule VII to the Constitution of India—Scope and interpretation of Entry 1, List III—Section 5 if offends Article 19 (1) (a) or 19 (1) (f) of the Constitution of India—Offence under section 5—If involves moral delinquency—Crimes involving moral delinquency—Tests to determine

Madras Panchayat Act (XXXV of 1958), section 25 (1)—If offends Article 14 of the Constitution of India—Conviction under section 5 of Prevention of Insults to National Honour Act (Madras Act XIV of 1957)—If taints a person with moral delinquency—Convicted person if disqualified under section 25 (1) for election as a member of a Panchayat

Section 5 of the Prevention of Insults to National Honour Act (Madras Act XIV of 1957) squarely falls under the head, "Criminal law" in Item 1 of List III of Schedule VII to the Constitution of India and so is within the legislative competence of the State Legislature The legislation is not with respect to National honour but with respect to an offence in which National honour is involved The purpose of the Act, its pith and substance, is to give statutory recognition to a public sentiment, to penalise that which in the view of the State the community regards as improper and offensive to its sentiments The fact that the subject National honour is not within the State's competence cannot preclude the State from acting within its sphere and making criminal, wrongful abuse or insult to National honour It is manifest that the legislative purpose is to create a crime and not to create for the people emblems of National honour

State of Rajasthan v. *G Chawla*, A I R 1959 S C 544 and *Russel* v *The Queen*, (1882) L R. 7 A C. 829, Rel on

(*Obiter*) Madras Act XIV of 1957 may conceivably fall even under the head "Public order" in Item 1 of List II of Schedule VII to the Constitution of India as it will be open for the State under that head to prohibit by punishment any act or conduct likely to disturb peace and public tranquillity or interfere with the placid life of the community However, it is unncessary to canvass the tenability of the legislation under Item 1 of List II as it could without any difficulty be maintained under Item I of List III

When examining the character of an enactment the constitutional validity of which is put in issue, the presumption being in favour of its validity, the Court will, if possible, give it such construction as

* W A No 260 of 1965 and
W.P. No. 751 of 1965. 3rd January, 1966.

will enable it to have effect Unless the invalidity of an enactment is beyond doubt, the Court will not strike down an Act as *ultra vires*.

While considering the legislative competency of the State and interpreting the heads of legislation with reference to any particular measure, the test applied is to look for the pith and substance of the measure, its object or legislative intent, its purpose, and then find whether, thus substantialised the measure falls within the field of legislation assigned to the State In other words, it must be seen whether the Act is " with respect to " any of the matters in the State List or in the Concurrent List.

If two constructions are possible and a legislation could properly be related to one of the enumerated heads of legislation, that construction should be given to the statute which will avoid making it fall under the residuary power, particularly when relating it to the residuary power would invalidate the Act, though it is also true that the language of the enactment cannot be strained nor its immediate object and purpose ignored with a view to avoid its falling under the residuary power

The head of legislation " Criminal law " in Item 1 of List III is of wide significance and comprehensive in its scope Under this head the State Legislature and the Parliament have competence to legislate upon all matters which relate to criminal law, so long as the laws so enacted do not affect offences against laws expressly excluded under the entry itself The contention that the State cannot under this head create new offences, even though it is not an offence against any laws in respect of matters in List I or List II, is not tenable The power under this head is not limited to offences in respect of laws made in List III.

Section 5 of the Prevention of Insults to National Honour Act (Madras Act XIV of 1957) does not contravene Article 19 (1) (*a*) of the Constitution of India which guarantees freedom of speech and expression Section 5 only penalises the wilful burning of any copy or a part of the Constitution The word " wilfully " denotes an evil intention It is not every burning of a copy of the Constitution that is made an offence It is the burning of the Constitution with an intention of desecrating or insulting it that is penalised This is apparent from the Short Title and the Preamble of the Act, it being an established principle of interpretation of statute that if very general language is used in an enactment, which it is clear must have been intended to have some limitation put upon it, the Preamble may be used to indicate to what particular instances the enactment is intended to apply

Thus, the restriction placed by section 5 of the Madras Act XIV of 1957 must be held to be reasonable and in the interest of public order within the meaning of Article 19 (2) of the Constitution of India.

Nor does the section violate the fundamental right guaranteed under Article 19 (1) (*f*) of the Constitution of India Nobody can claim any fundamental right to annoy and injure the feelings of large sections of the public by desecrating or insulting a document embodying the Constitution which they venerate and hold dear, and plead that he can do what he pleases with his own property

In re *N V Natarajan*, (1964) 2 M L J 530. (1964) M L J (Crl) 666, followed

It cannot be contended that section 25 (1) of the Madras Panchayat Act (XXXV of 1958) is discriminatory and is violative of Article 14 of the Constitution of India on the ground that this provision differs from similar provisions in other enactments in respect of elections to local bodies The Act by itself does not discriminate between one class of persons and another class, where both classes of persons are similarly situated The Act has classified persons who have been convicted for offences involving moral delinquency This classification cannot be said to be irrational

The offence under section 5 of the Prevention of Insults to National Honour Act (Madras Act XIV of 1957) is an offence involving moral delinquency and therefore a person who is convicted and sentenced under that section would be disqualified under section 25 (1) of the Madras Panchayat Act (XXXV of 1958) for election as a member of a Panchayat

It is difficult to postulate and lay down any hard and fast rule or enunciate any cut-and-dried principle as to what crimes may be said to involve moral delinquency As a concept, it does not lend itself to any precise definition However, a fair working rule may be phrased thus morals and standards of social behaviour, the duties which one human being owes to his fellow being or to the society are potential materials for the legislator and if the breach of the then current moral or social code is also according to law an offence, the offence could generally, without probe into its innate character be held to involve moral delinquency That heavy punishments are provided for particular offences and law considers them as grave crimes may not always be conclusive of the existence of moral turpitude in the offence Nor can the severity of the punishment actually meted out in any particular case, or its lightness, determine the issue one way or the other One element there must be for an offence to take in the taint of moral turpitude the act must be regarded as immoral or disreputable, unworthy and discreditable in an honest citizen and discountenanced by society, regardless of whether the act is punished by law as an offence But bad motive is not a necessary ingredient for being guilty of moral turpitude , a man's view may be perverted and a negation of what society at large considers as moral.

Case-law discussed.

On ultimate analysis the position resolve to this : whenever the question arises whether a particular offence involves moral delinquency, the particular case will have to be decided on its own facts and the conclusion will have to be in accordance with the public morals of the time and the commonsense of the community as ultimately judicially interpreted Here again the context and the purpose for which the character of the offence has to be determined will have a bearing on the matter The question has to be approached not in an abstract fashion, but bearing in mind the implications of the particular offence and the requirements and object of the statute for which moral element has to be assessed.

The phrase 'moral delinquency' in section 25 (1) of the Madras Panchayat Act cannot be given a narrow construction Any offence that would have the effect of embarrassing a man socially by lowering him in public estimation and affecting his reputation must be held to be an offence involving moral delinquency under that provision

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr Justice Srinivasan, dated 17th August, 1965 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No 2141 of 1965 presented under Article 226 of the Constitution of India to issue a Writ of *certiorari* calling for the records in R O C No 2261/64, dated 22nd January, 1965 on the file of the Revenue Divisional Officer, Namakkal and quash the same

M K Nambiyar for *P R Gokulakrishnan* and *B Soundarapandian*, for Appellants in W A No 260 of 1965.

V G Row, *C Kothandaraman* and *N G R Prasad*, for Petitioner in W P No 751 of 1965.

The Additional Government Pleader on behalf of Respondents 1 to 4 in W A No 260 of 1965

The Advocate-General, The Additional Government Pleader and *T. R. Srinivasan*, for Respondents in W P. No 751 of 1965.

The Judgment of the Court was delivered by

Natesan, J—These two cases raise certain interesting and important questions, particularly the competency of the State Legislature to enact Madras Act XIV of 1957, Prevention of Insults to National Honour Act (hereinafter referred to as the Act), and whether section 5 of the Act is invalid as violative of the fundamental rights guaranteed under Article 19 (1) (*a*) and (1) (*f*) of the Constitution A further question for consideration and one of some difficulty is, whether a conviction under section 5 of the Act for burning a copy of the Consititution taints a candidate for election as a member of a Panchayat under Madras Act XXXV of 1958 with moral delinquency, and under section 25 (1) of the Panchayat Act disqualifies him for election Another plea is raised that the disqualification as imposed under section 25 (1) is discriminatory and offends Article 14 of the Constitution

We shall first briefly set out the facts in the two cases W.A No. 260 of 1965 arises out of the election held in January, 1965 of members for the Namagiripet Town Panchayat, Salem District The nomination of the appellant Tamizhazhagan, a voter in the electoral rolls for the Panchayat, was rejected by the Returning Officer on the sole ground that he had been convicted by the Sub-Divisional Magistrate, Sankari, in C C No 294 of 1964 on 6th October, 1964 and sentenced to undergo R I. for six months under section 5 of the Prevention of Insults to National Honour Act. The Returning Officer took the view that the offence was one involving moral delinquency and therefore the appellant was disqualified for election as a member. Section 25 (1) of the Panchayat Act Madras Act(XXXV of 1958) runs thus :

> " A person who has been sentenced by a criminal Court to imprisonment for any offence involving moral delinquency (such sentence not having been reversed) shall be disqualified for election as a member while undergoing the sentence and for five years from the date of the expiration thereof "

From the order of rejection the appellant preferred an appeal to the Revenue Divisional Officer, Namakkal, provided under the Rules Relating to the Conduct of Election of Members, and failing in the appeal, brought up the matter to this Court by way of an application under Article 226 of the Constitution in W P No 2141 of 1965 The further details as to the offence and the conviction will be considered later But it may be stated for the present that the appellant had pleaded guilty of the offence with which he was charged, wilfully burning Part XVII of the Constitution of India on 4th October, 1964 at about 5 P M in the Shandypet Maidan at Rasipuram. When the writ petition came up before our learned brother Srinivasan, J, the validity of the Act has already been the subject of consideration in another case by a Division Bench in In re *N V Natarajan*[1]. The learned Judges Veeraswami

1. (1964) 2 M L J. 530 . (1964) M L J. (Crl) 666.

and Kunhamed Kutti, JJ, before whom the constitutionality had been raised on an application to quash charges under section 5 of the Act read with section 120-B of the Indian Penal Code, upheld the constitutionality of the impugned section 5 of the Act On the question whether the offence under the Act involved moral delinquency, considering the nature of the offence, Srinivasan, J, held that here was a case of wilful and callous disregard of the feelings of the public and indeed a positive injury to their feelings in the shape of burning the Constitution, and that it cannot be lightly regarded as an offence not involving moral delinquency On the view and following the Division Bench's decision above referred to on the question of the validity of legislation, the learned Judge discharged the rule *nisi* Hence the appeal.

The other case W P No. 751 of 1965 relates to the election of members to the minor village panchayat of Kambarajapuram, Kancheepuram Taluk, Chingleput District There are only two wards for the panchayat, each ward to elect three members, the total strength of the panchayat being six The election was to be held on 2nd February, 1965, the last date for nomination being 31st of January, 1965. The same was the date for scrutiny of nomination papers The petitioner K M Rajagopal and eight others filed their nomination papers for the first ward and for the second ward five persons filed their nominations At the scrutiny held by one Srinivasan, a Tamil Pandit of the Municipal High School, Kancheepuram, the Election Officer for the election in question, the nomination of the petitioner was rejected *suo motu* It is stated that no reasons were given in writing in spite of a request by the election agent of the petitioner On the rejection of the petitioner's nomination—according to the petitioner in a arbitrary fashion—it is stated that the other eight candidates for the first ward and all the candidates for the second ward withdrew their nominations and no election was therefore held as programmed. The petitioner was able to secure in writing the ground of rejection of his nomination paper only on 9th December, 1965 on an application to the Returning Officer. It is found that the nomination of the petitioner has been rejected on the ground that he sustained disqualification, having suffered R I for six months by the conviction in C C No 54 of 1964 on 15th May, 1964 for offences punishable under sections 143 and 120-B, Indian Penal Code, read with section 5 of Madras Act XIV of 1957 From the counter-affidavits filed by the Returning Officer and the Election Officer in this case it is clear that the first respondent herein did not, when scrutinising the nomination paper, exercise his own discretion It transpired that on 30th January, 1965, the Returning Officer had sent to the Election Officer for his information and guidance a confidential letter he had received from the third respondent in the writ petition, giving a list of persons convicted under sections 143, 109, 120-B and 182, Indian Penal Code and section 32 of the Police Act and section 5 of the Prevention of Insults to National Honour Act The Election Officer, who has been made the second respondent in the application, frankly states in his counter-affidavit.

> "As I said, I *bona fide* thought that in communicating the letter of the third respondent along with the enclosure the first respondent intended to inform me that these persons whose names are found in the list are disqualified in law and that I should reject their nominations if received"

Apart from other grounds common with the writ appeal, a special ground is raised in this case that the Election Officer has surrendered his judgment to the dictates of the first and third respondent and the rejection of the nomination paper is therefore invalid In view of several questions raised in the writ petition and the same questions arise for consideration in W A No 260 of 1965, the writ petition itself was taken up for hearing by us

Petitioners in both the cases are prominent members of a political party, the Dravida Munnetra Kazhagam, and it is their case that the acts in question which have been labelled an offence are merely expressions of their views and ventilation of their grievance with regard to the language issue commonly referred to as the Anti-Hindi agitation As would be seen from the F I R. and the charge-sheet in the record of W P No 751 of 1965, the General Secretary of the D M K already at a conference held at Madras on the 12th and 13th October, 1963 had announced the decision of the Kazhagam to conduct an agitation against the imposition of Hindi in

Madras State by burning publicly Part XVII of the Constitution of the Indian Republic In the cases before us it is in furtherance of this agitation and to mark their protest against the imposition of Hindi, the petitioners had publicly burned copies of Part XVII of the Constitution after duly announcing their intention to do so and courted arrest They pleaded guilty to the charges levelled against them and suffered imprisonment voluntarily.

We shall first take up for consideration the competency of the State Legislature to enact Madras Act XIV of 1957 The *Act is entitled* an Act to prevent insults to National Honour The Preamble runs thus

"Whereas it is expedient and necessary to prevent certain offences against the Indian National Flag, pictures, effigies and statute of the father of the Nation, or the Constitution of India "

The Short Title of the Act as found in section 1 is

"This Act may be called the Prevention of Insults to National Honour Act, 1957 "

Section 2 of the Act makes a wilful burning or desecrating or insulting any effigy, picture or portrait of Mahatma Gandhi an offence punishable with imprisonment of either description for a term which may extend to three years or with fine or with both Section 3 makes a wilful causing of damage to or destruction of any statute of Mahatma Gandhi an offence Section 4 makes a wilful burning or desecrating or insulting the Indian National Flag an offence Section 5 whose validity is impugned and with which we are concerned in the present cases, runs thus

"Whoever wilfully burns or desecrates or insults any copy or copy of a part of the Constitution of India, shall be punishable with imprisonment of either description for a term which may extend to three years or with fine or with both "

Of the remaining two sections in the Act, section 6 makes an attempt to commit any of the offences punishable under the Act as an offence committed, and section 7 provides that a person proceeded against under the provisions of the Act shall not be exempted from any other action that may be taken against him The principal argument on behalf of the petitioners urged with considerable force is that the Act in question deals with national honour, the subject is national honour and the substance of the legislation is to create emblems of national honour and protect them from desecration. It is contended that national honour is not a subject either in the State List or in the Concurrent List of the Schedule VII to the Constitution It does not come under any specific head in List I and under Head 97 of List I and Article 248 of the Constitution the Parliament will have the exclusive power to make laws in relation thereto.

Now, when examining the character of an enactment the constitutional validity of which is put in issue, the presumption being in favour of its validity, the Court will, if possible, give it such construction as will enable it to have effect Unless the invalidity of an enactment is beyond doubt, the Court will not strike down an Act as *ultra vires* Under the Constitution the State legislative power is to be found either under List II of the Seventh Schedule, the State List, or under List III, the Concurrent List The Advocate-General appearing for the State would primarily rest the State's legislative power in the matter under Item 1 of List III—

"Criminal law, including all matters in the Indian Penal Code at the commencement of the Constitution, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the Civil power "

Alternatively it is submitted that the State could rely on Item 1 of List II —

"Public order but not including the use of naval, military or air force or any other armed forces of the Union in aid of the civil power "

While considering the legislative competence of the State, and interpreting the heads of legislation with reference to any particular measure the test applied is to look for the pith and substance of the measure, its object or legislative intent, its purpose, and then find whether, thus substantialised the measure falls within the field of legislation assigned to the State The decisions of the Judicial Committee from Canada under the British North America Act, 1867, may be usefully referred to in

this context Under the Canadian Constitution the general residuary power is vested in the Dominion Parliament and an attempt has been made to divide the important subjects of legislation between the Dominion and the Provinces. Section 92 of the British North America Act gives to the Provincial Legislatures exclusive authority to make laws in relation to matters coming within the list of enumerated Provincial subjects and section 91 lists the matters coming within the competency of the Dominion Parliament, besides a general power to legislate for the peace and good Government of Canada In *Subramanyan* v *Muthuswami*[1], a case arising under the Government of India Act, 1935, the Legislative Lists wherein are in the main and substantially followed under the present Constitution, after referring to the British North America Act, Gwyer, C J observed .

> " It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list,touches also on a subject in another list and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance' or its 'true nature and character' for the purpose of determining whether it is legislation with respect to matters in this list or in that *Citizens Insurance Co* v *Parsons*[2] , *Russel* v *Reg*[3], *Union Colliery Co* v *Bryden*[4], *Attorney-General for Canada* v *Attorney-General for British Columbia*[5], *Board of Trustees of Northern Irrigation District* v. *Independent Orders of Foresters*[6] In my opinion, this rule of interpretation is equally applicable to the Indian Constitution Act "

In the same case Sulaiman, J , observed that it was wrong to assume that the doctrine of ' pith and substance ' laid down by their Lordships was a special doctrine exclusively applicable to the Canadian Constitution. When examining the heads or items in the lists, Gwyer, C J , in *United Provinces* v *Atiqua Begum*[7], observes ·

> " I think, however, that none of the items in the lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it "

The legislation for different purposes may deal with the same subject-matter But the question in each case would be as to the true nature and character of legislation or as to what is also termed ' pith and marrow' of the legislation It is the view of Sir Ivor Jennings in his work, " The Constitutional Laws of the Commonwealth " (Second Edition at page 192) that the specific heads refer to *purposes*. We are inclined to agree with this approach and the case-law in our country supports it. The first step when examining a Legislature's competency is to see whether the Act is ' with respect to ' any of the matters in its List or in the Concurrent List. If it is not in either of the Lists, then the Act falls to the ground. If it falls in the Concurrent List and there is repugnancy between the law of the State and the law of the Union both under the concurrent spheres the law of the Union will prevail. The State legislation could, however, prevail, notwithstanding the repugnancy, if the State law was reserved for the President and has received his assent under Article 254 of the Constitution.

In *State of Rajasthan* v *Chawla*[8], Hidayatullah, J., delivering the judgment of the Supreme Court, states :

> " After the dictum of Lord Selborne in *Queen Empress* v *Burah*[9], oft-quoted and applied, it must be held as settled that the Legislatures in our country possess plenary powers of legislation. This is so even after the division of the legislative powers, subject to this that the supremacy of the Legislatures is confined to the topics mentioned as Entries in the List conferring respectively powers on them These Entries, it has been ruled on many an occasion, though meant to be mutually exclusive, are sometimes not really so They occasionally overlap, and are to be regarded as *enumeratio simplex* of broad categories Where in an organic instrument such enumerated powers of legislation exist and there is a conflict between rival Lists, it is necessary to examine the impugned legislation in its pith and substance and only if that pith and substance falls substantially within an Entry or Entries conferring legislative power, is the legislation valid, a slight transgression upon a rival list, notwithstanding "

1 (1941) 1 M L J (Supp) 1 (1940) F L J (F.C) 157 A I R 1941 F C 47 at 51
2 (1881) L R 7 A C 96
3 (1882) L R 7 A C 829.
4. L R. (1899) A C 580
5. L R (1930) A C 111.
6 L R (1940) A C 513
7 (1941) 1 M L J 746 · L R 68 I A 34· A I R 1941 F C 16 at 25
8 1959 S C J 485 1959 M L J (Crl) 309.
9 L R. (1878) 3 A C 839

The learned Judge refers to the passage in *Subramanian* v. *Muthuswami*[1], which has already been set out, and observes:

"It is equally well settled that the power to legislate on a topic of legislation carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given"

The legislative power being conferred under the Constitution "with respect to" heads of Legislation in the Lists, the scope and ambit of the expression "with respect to" has been the subject of consideration In the British North America Act, the phrase used in conferring power is "in relation to" and it is in the Commonwealth of Australian Constitution Act in section 51 while the powers of the Parliament are specified, the phrase "with respect to" is used. In *Subramanian* v *Muthuswami*[1], at page 54 Sulaiman, J, elaborates the phrase "with respect to" thus

"To avoid such difficulties the Imperial Parliament has thought fit to use the expression "with respect to" which obviously means that looking at the legislation as a whole, it must substantially be with respect to a matter in one List or the other A remote connection is not enough Those words do not connote the idea that it must be absolutely and exclusively within one List and not encroaching, not even in an indirect way, upon any other."

In *United Provinces* v. *Atiqua Bagum*[2], Varadachariar, J., comparing the two phrases "with respect to" and "relating to" remarks at page 45 thus:

"A point was made by the learned Counsel for the respondents that section 100, Constitution Act used the expression 'with respect to any of the matters enumerated in the List' and not words like 'relating to the matters enumerated in the List' It seems to me that the words "with respect" are not by any means less comprehensive than the words 'relating to'."

In Wynes' Legislative Executive and Judicial Powers in Australia, 3rd Edition, at page 30, the comment with reference to "with respect to" runs thus:

"The late Mr Justice Higgins frequently drew attention to the fact that the Constitution commits to the Commonwealth Parliament power to make laws, etc "with respect to" that is to say, "on the subject of" the enumerated powers The matter is of some importance, for, as the learned Judge observed in *Mr Arthur's case* "we have to determine in each case what is the subject of the legislation—what subject is the Act 'with respect to' what it affects—not what things or operations it may indirectly affect" On the other hand, the force of this argument must not be over-estimated for Parliament cannot enlarge the scope of its powers beyond the limits expressed in the Constitution by references to the words "with respect to", as, for example, by attempting to define the subject matters of legislative power in a particular case The true position is that the Commonwealth may legislate "with respect to" certain subjects, which means that it may exercise all necessary and incidental powers, including the power of passing ancillary provisions which may not be strictly and directly referable to the actual heading under which the grant is made"

In the footnote is noted the observation of Latham, C J, in the *Banking case*[3], that "no form of words has been suggested which would give a wider power" than these words which conferred "as wide a legislative power as can be created"

We may, at the outset, state that the attack on the *vires* is confined in the present case only to section 5 where burning of a copy of the Constitution is made an offence. The contention for the petitioners is that the subject of this Act is even *ex facie*. National Honour and that a copy of the Constitution is made an emblem of National Honour. Our attention is drawn to certain items in List I—Items 23, 24, 62, 53 64 and 67, where National Highways, National Water Ways and Institutions of National Importance are found The argument is that similarly National Honour could properly be a subject of legislation only by the Union In our view, this is not a proper test. The fact that matters of national importance are to be found only in List I, is not of much importance and cannot add to the argument, if in fact the pith and substance of the Legislation in question cannot be found under one or other of the Items in List II or List III Learned Counsel would have us examine the contents of the impugned Legislation side by side with Central Act XIX of 1950 the Emblems and Names (Prevention of Improper Use) Act. Under the Schedule to the Act are to be found the Indian National Flag, and the name or pictorial representation of Mahatma Gandhi or Pandit Jawaharlal Nehru, besides various other items There is to be found also the name, emblem or official seal of the United

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1 (1941) 1 M L J. (Supp) 1 : (1940) F L J. (F C.) 157 A I R. 1941 F C 47 (54).
2. (1941) 1 M L J 746 : L R. 68 I A. 34 : A I R. 1941 F C 16 at 45.
3 (1948) 76 C L R. 186.

Nations Organisation, the emblems of the St John Ambulance Association and any name which may suggest or be calculated to suggest the patronage of the Government of India or the Government of a State and so on The object and purpose of that Act is entirely different Its purpose is to prevent improper use of certain emblems and names for professional and commercial purposes The argument is that the impugned Act by section 5 creates an emblem of national honour in a copy of the Constitution and it could only be done by the Parliament under its residuary legislative power. It may be that the Act is not for the first time defining or creating national honour, but certainly, it is the contention that it marks out a copy of the Constitution as one of the emblems of national honour and therefore it would come under Item 97 of List I and any offence relating to such emblem would fall under Item 93 of List I Mr M K. Nambiar for the petitioners would contend that there must be first substantive law and then provisions for punishment in relation to its breach There can be an offence only against a law in respect of a matter Learned Counsel Mr Nambiar would concede that the same Act may contain both the law and penal provision in relation thereto As we understand learned Counsel, the impugned Act relates to national honour, makes a copy of the Constitution a subject of national honour, and makes it an offence to burn the copy The Act will therefore fall under Article 254 of the Constitution or Item 97 read with Item 93 of the Union List. Therefore it is outside the legislative competency of the State If it is " public order," Item 1 in the State List, that is relied upon for the legislative competence, then there must be a law relating thereto and any offence against the law would come under Item 64 of the State List. Admittedly there is no substantive law relating to public order on the subject. Mr. V G Rao for Messrs Rao and Reddy would submit in the alternative that the Act creates only offences, that it does not fall under List II and it cannot fall under Item 1 of List III as the head of offence thereunder should be confined to matters under List III

We shall first take up for consideration the claim of the State that the pith and substance of legislation is " Criminal Law," Item 1 of List III, and that an offence is created under the impugned Act for the first time. It is submitted by the learned Advocate-General for the State that the present legislation is not ancillary to any of the matters in List I or to any matter, outside Lists II and III. While it is contended for the petitioners that unquestionably this is a legislation relating to national honour, the contention contra is that the primary intent is to make certain act an offence, and the penal provision is not merely ancillary to any substantive law, the purpose, aim and object of the legislation itself being to create offences. Now, when the subject-matter of the legislation could properly fall under the head ' Criminal Law,' it should not be referred to the residuary power In *Subramaniam* v. *Muthuswami*[1], Sulaiman, J , observes at page 55 .

> " But resort to that residual power (section 104 of Government of India Act, 1935), should be the very last refuge It is only when all the categories in the three Lists are absolutely exhausted that one can think of falling back upon a non-descript "

Of course, the residuary power under the present Constitution is not of the same kind as under the Constitution of 1935 The three Lists under the Constitution Act of 1935 were intended to be exhaustive. Now residuary subjects are recognised even in List I—Item 97 Still, if two constructions are possible and legislation could properly be related to one of the enumerated heads of legislation, the construction should be given to the statute which will avoid making it fall under the residuary power, particularly when relating it to the residuary power would invalidate the Act. True, the language of the enactment cannot be strained, nor its immediate objects and purpose ignored with a view to avoid its falling under the residuary power A pretended exercise of power cannot be regularised by construction.

The head of legislation ' Criminal Law,' Item 1 in the Concurrent List, is of wide significance and comprehensive in its scope Criminal Law is made to include all matters included in the Indian Penal Code at the commencement of the Consti-

1. (1941) 1 M L J (Supp) 1 (1941) F L J (F C) 157 A I R. 1941 F C. 47 (55).

tution The all embrasive character of the head is only accentuated by this inclusion and further more emphasised by excluding from its scope offences against laws with respect to any of the matters specified in List I or List II, and excluding further the use of naval, military or air-force or any other armed forces of the Union in aid of the civil power Naval, military or air-force or any other armed forces of the Union is Item 2 in the Union List Their use under the head of Criminal Law in the Concurrent List is specifically excluded. The need for such express exclusions, as we see it, illustrates its scope and ' Criminal Procedure ' is a separate head. In our view, under the head ' Criminal Law,' the State Legislature and the Parliament have competence to legislate upon all matters which relate to Criminal Law, so long as the laws so enacted do not affect offences against laws expressly excluded under the Entry itself. Mr. Nambiar would interpret the head as excluding offences in respect of any of the matters specified in List I or List II, or falling under the residuary power of the Parliament, whether there is a law in respect of the matter or not Learned Counsel would submit that the State cannot, under this head, create new offences, even though it is not an offence against any laws in respect of matters in List I or List II. The language of the head does not warrant this limitation. From the Concurrent List is excluded only offences against laws in respect of matters specified in List I or List II We agree with the observations of Veeraswami, J, in In re *N V Natarajan*[1]:

" the effect of the exclusion by the words ' excluding offences against laws with respect to any of the matters specified in List I or List II' is that, till a law is made with respect to any of the matters, in List I or List II, no limit is placed upon, and the exclusion does not operate to limit the ambit of the power under the head of ' Criminal Law ' in List III "

We are unable to accede to the contention of Mr V.G Rao, that the power under this head would be limited to offences in respect of laws made in List III, that is the power is equated to the power that is to be found in Item 93 in the Union List, and Item 64 in the State List The heads of legislation—Item 93 of List I and Item 64 of the List II—are clearly provisions designed to secure effective operation of valid legislation under the respective Lists It is needless to speculate whether, in the absence of such heads of legislation under List I and List II, penal provisions in respect of legislations under the Lists cannot be sustained as an incidental power and ancillary to the main purpose It looks as if the purpose of providing Items 93 and 64 is to take them expressly out of Item 1 of List III, and provide against one Legislature making laws in relation to offences against laws made by another Legislature, and that also explains the absence of a provision similar to Items 93 and 64 in List III Criminal Law surely, in our view, must mean also the creation of offences. All matters included in the Indian Penal Code at the commencement of the Constitution are also brought under its scope But the specification of matters under the Penal Code does not exhaust the amplitude of the power The Indian Penal Code contains various categories of offences, offences against the State, offences against public tranquillity, offences by or relating to public servants, offences relating to elections, coins and Government stamps, weights and measures, offences relating to public health, safety, convenience, decency and of morals, offences relating to religion and human body, offences relating to property, and so on Section 5 of the Penal Code contemplates penal laws other than those specified under the Code, by special and local laws. The General Clauses Act (Central) Act X of 1897, defines offence as meaning " any act or omission made punishable by any law for the time being in force ".

In Halsbary's Laws of England, Third Edition, Vol. 10, at p 271, para 501. criminal law and procedure are stated to deal with the nature, prosecution and punishment of crime, and crime is defined as " an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment " It is stated,

" Where a crime is often also an injury to a private person, who has a remedy in a civil action, it is as an act or default contrary to the order, peace and well-being of society that a crime is punishable by the State "

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1. (1964) 2 M L J 539. 1964 M L J (Crl) 666.

In *Mogul S. S. Co.* v. *McGregor Gow & Co.*[1] Lord Esher, M.R., stated, " an illegal act which is a wrong against the public welfare, seems to have the necessary elements of crime."

Bouvier's Law Dictionary defines crime thus ·

" Crime is defined as an act committed or omitted in violation of a public law forbidding or commanding it , a wrong which the Government notices as injurious to the public and punishes in what is called a criminal proceedings in its own name It generally denotes an offence of a deep and atrocious dye Crimes are defined and punished by statutes and by the common law and they embrace every indictable offence and include all immoral acts which tend to the prejudice of the community and are punishable criminally by Courts of justice "

In 14 American Jurisprudence, " Criminal Law ," at page 752, it is stated:

" The term ' Criminal Law ' is sufficiently comprehensive to cover all of that great branch of jurisprudence which deals in any way with crimes and punishments "

At page 753, defining crime, it is stated ·

" Certain kinds of wrongs are considered as of a public character because they possess elements of evil which affect the public as a whole, and not merely the person whose rights or property or person have been invaded Such a wrong is called a ' crime' The term is not easy to define Perhaps it can best be defined as any act or omission which is forbidden by law, to which a punishment is annexed, and which the State prosecutes in its own name If the law has provided no effectual means for the trial or punishment of a particular act, there is an immunity from punishment, no matter how great an offender the individual may be, nor how much his crimes may have shocked the sense of justice of the country or endangered its safety "

It is clear from the above that it is for the State according to its view of public policy, to declare any particular act to be a crime As noticed in Bouvier's Law Dictionary a wrong which the Government notices as injurious to the public and punishes it, will be a crime. We have for instance, section 295 of the Indian Penal Code, making injury to or defiling places of worship with intent to insult the religion of any class of persons an offence Under that section, whoever destroys, damages or defiles any place of worship or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damages or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both But this provision is confined to insulting the religion of any class of persons, and the religious susceptibilities of any class of persons This section and other provisions in the Act, like section 295-A (providing against deliberate and malicious acts intended to outrage the religious feelings of any class by insulting its religion or religious beliefs), section 297 (making it a crime to trespass on burial places or places of worship with the intention of wounding the feelings of any person or insulting the religion of any person, or offering indignity to any human corpse), and section 509 (making it penal to insult the modesty of a woman by word, gesture or act), give an idea of the wide sweep that Criminal Law could take

Patriotism and loyalty to the Constitution are matters of feeling and conduct with the human spirit. They are capable of drawing out of man the highest of his noble qualities and supreme sacrifice They belong to the category of feelings which, at any rate at the present stage of society and world order, man regards as of paramount importance From such belief flows sentiments of great regard and veneration to objects which symbolise such feelings The Constitution of India which the people of India have given themselves, symolises the realisation of their cherished dreams after decades of unparalleled sacrifice, and it is but natural to expect any citizen of India to regard with veneration any document that embodies the Constitution True, the Constitution can be amended and has been amended several times, but the Constitution is an organic instrument and carries within it the power to get itself amended. To the instrument as it stands he pays his deepest homage. It symbolises to him his hard won sovereignty, it contains his charter of rights

It is quite a common feature to be observed that people in this country, at least large sections, look with veneration upon any parchment, paper, palm leaf, or slate,

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1 (1889) L R. 23 Q B D 589 at 606

which records any writing, as manifestations of Goddess Saraswathi If, in such circumstances, the State should think it necessary to declare the wilful burning of any article embodying the Constitution or part of it, an offence, the State is only discharging its duty, and reflecting the sentiments of large sections of the Indian public, it is only making punishable an act which may otherwise go unpunished, though it might have offended the sentiments of large sections of the community, and deeply wounded their feelings It will be a case of *mala in se*, that is, an offence against nature or contrary to the moral sense of the community, and not a mere *mala prohibita*, that is, an offence against laws which enjoin positve duties and forbid things which are not *mala in se*, to which is annexed a penalty for non-compliance.

Here we would like to quote the observations of the Supreme Court in *Veerabadran Chettiar* v. *Ramaswami Naicker*[1] The decision impliedly recognise the duty of the State to protect the sentiments and susceptibilities of its different groups of citizens That was a case of religious susceptibilities The question in that case was whether the breaking in public of an unconsecrated clay idol of God Ganesa held sacred by a large section of Hindus with the express intention of insulting the feelings, of the Hindu community would be an offence under section 295, Indian Penal Code The Indian Penal Code had used the words " any object held sacred by any class of persons." Differing from this Court and holding that idols are only illustrative of those words and the objects destroyed need not be consecrated ones, Sinha, J , delivering the judgment of the Supreme Court, remarks at page 1035 :

"A sacred book like the Bible, or the Koran, or the Granth Saheb, is clearly within the ambit of these general words If the Courts below were right in their interpretation of the crucial words in section 295, the burning or otherwise destroying or defiling such sacred books will not come within the purview of the penal statute In our opinion, placing such a restricted interpretation on the words of such general import, is against all established canons of construction Any object, however trivial or destitute of real value in itself, if regarded as sacred by any class of persons, would come within the meaning of the penal section Nor is it absolutely necessary that the object, in order to be held sacred, should have been actually worshipped An object may be held sacred by a class of persons without being worshipped by them It is clear, therefore, that the Courts below were rather cynical in so lightly brushing aside the religious susceptibilities of that class of persons to which the complainant claims to belong The section has been intended to respect the religious susceptibilities of persons of different religious persuasions or creeds Courts have got to be very circumspect in such matters, and to pay due regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they share these beliefs or whether they are rational or otherwise, in the opinion of the Court "

Our attention was drawn by the learned Advocate-General to *Proprietary Articles Trade Association* v *Attorney-General for Canada*[2], a case arising under the British North America Act The Dominion Parliament of Canada sought to maintain the validity of the impugned legislation by referring to Item 27 in section 91 in the Dominion List, which ran

"Criminal Law, excepting the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters "

For the Province it was contended that the legislation fell within the exclusive legislative powers of the Province under the heads " Property and Civil Rights or Administration of Justice " After posing as one of the questions for consideration, whether in substance, the legislation fell within the enumerated class of subjects or whether, on the contrary, under the guise of enumerated class, it was an encroachment on an included class, the Judicial Committee observed

"'Criminal law' means 'the criminal law in its widest sense' *Attorney-General for Ontario* v *Hamilton Street Railway Co* [3] It certainly is not confined to what was criminal by the law of England or of any Province in 1867 The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State The criminal quality of an act cannot be discerned by intuition , nor can it be discovered by reference to any standard but one, Is the act prohibited with penal consequences ? . It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of ' criminal jurisprudence ', for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by

1 (1958) M L J (Crl) 989 (1959) 1 An W R (S C) 1 (1959) 3 M L J (S C) 1 1959 S C J 1 A I R. 1958 S C. 1032 (1035)

2 L R (1931) A C 310 at 324

3 L R (1903) A C 524

the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished "

Reference may be made to the decision of the Judicial Committee in *Attorney-General for British Columbia* v *Attorney-General for Canada*[1], where again the amplitude of the head of legislation Criminal Law, head 27 of section 91 of the British North America Act, came up for consideration Following the *Proprietary Articles Trade Association case*[2], above referred to, Lord Atkin states

" The basis of that decision is that there is no other criterion of 'wrongness' than the intention of the Legislature in the public interest to prohibit the act or omission made criminal Cannon, J, was of opinion that the prohibition cannot have been made in the public interest because it has in view only the protection of the individual competitor's of the vendor This appears to narrow unduly the discretion of the Dominion Legislature in considering the public interest The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in section 92 It is no objection that it does in fact affect them If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights The object of an amendment of the criminal law, as a rule, is to deprive the citizen of the right to do that which apart from the amendment, he could lawfully do No doubt, the plenary power given by section 91 (27) does not deprive the Provinces of their rights under section 92 (15) of affixing penal sanctions to their own competent legislation."

Reference was made on behalf of the petitioners to *The Board of Commerce case*[3]. Emphasis was laid on the following passage at page 199 of the report.

" It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require title to so interfere as basis of their application."

In the context of the enactment now impugned before us, this observation has no bearing. The immediately preceding observations of Viscount Haldane are apposite for the present case

" It is one thing to construe the words 'the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters,' as enabling the Dominion Parliament to exercise exclusive legislative power where the subject-matter is one which by its very nature belongs to the domain of criminal jurispurdence A general law, to take an example, making incest a crime, belongs to this class "

It is after this passage that the observation relied upon by the learned Counsel for the petitioners comes The power of Parliament to make a crime under the general law was recognised

The decision, *Attorney-General for Ontario* v *Reciprocal Insurers*[4], is also not of any assistance to the petitioners in the present case The Privy Council, no doubt, observes that

"the Parliament of Canada cannot, by purporting to create penal sections under section 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid "

Certainly the legislation in the present case cannot be said to be criminal in form only. Scrutinized in its entirety, the legislation is wholly criminal and, as admitted by Mr. V G Rao for the petitioners in W P. No 751 of 1965, the Act only creates offences Neither the Object and Reasons for the enactment, nor the Title can be decisive of the pith and substance or true character of the legislation Of its, seven sections leaving out the Title and the saving provision the rest of it only make offences of certain acts and provide for punishment The following observations in the *Reciprocal Insurers' case*[4], may be usefully referred to at p 343 :

" Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of section 91, but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the sub-divisions of the jurisdiction entrusted to the Provinces It is one thing, for

1 L R (1937) A C 368 at 375.
2 L R (1931) A C 310 at 324
3 L R (1922) 1 A C 191 at 199
4 L R (1924) A C 328

example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the criminal Code, it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial Railways "

A charge of the latter kind that the State in this case was in the guise of enacting criminal law usurping the Centre's legislative power cannot in our view be laid. The fact that the offence relates to the Constitution a matter of all-India concern, and insult to what is termed as national honour is aimed at national honour not being within the State's legislative competence is neither here nor there when the legislative measure is for punishing a particular conduct not the subject of any previous legislation by the Centre.

The decision of the Privy Council in *Russel* v *The Queen*[1] is of considerable significance and requires specific mention The case arose under the Temperance Act of Canada on a conviction under the Act The question raised before the Privy Council was that, having regard to the distribution of legislative powers under the British North America Act it was not competent for the Parliament of Canada to pass the Act in question For the Provinces several items under the Provincial List were relied upon under one or the other of which the Act could be contained. Dealing with the head ' property and civil rights ' of the Provinces the Judicial Committee stated .

" Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects, 'property and civil rights' It has in its legal aspect one obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to the public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section What Parliament is dealing with in legislation of this kind *is not a matter in relation to property and its rights, but one relating to public order and safety* That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, the incidental interference does not alter the character of the law Upon the same considerations *the Act in question cannot be regarded as legislation in relation to civil rights In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property to be criminal and wrongful Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork a horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleased with his own, cannot properly be regarded as legislation in relation to property or to civil rights* Nor could a law which prohibited or restricted the sale or exposure of cattle having a contiguous disease be so regarded Law of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights They are of a nature which fell within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada " (The emphasis (*italics*) is ours.)

State of Rajasthan v. *G. Chawla*[2] gives a direct lead for the determination of the present case The impugned Act was a State law entitled Ajmer (Sound Amplifiers Control) Act. The case arose out of a prosecution for breach of the conditions of a permit granted under the Act- *inter alia* that the amplifiers had been so tuned as to be audible beyond the prescribed limit While the State relied on Entry 6 of the State List ' Public Health and Sanitation Hospitals and Dispensaries ' to oust the jurisdiction of the State Item 31 of the Union List ' Post and Telegraphs, Telephones, Wireless, Broadcasting and other like forms of communication.' was relied upon. Before the Supreme Court besides Entry 6, reliance was placed on Entry, 1 ' Public Order (but not .. .etc)' Hidayatullah, J , in validating the legislation as within the legislative competence of the State, observes ·

" There can be little doubt that the growing nuisance of blaring loudspeakers powered by amplifiers of great output needed control, and the short question is whether this salutary measure can be said to fall within one or more of the Entries in the State List It must be admitted that amplifiers are instruments of broadcasting, and even of communication, and in that view of the matter, they fall within Entry 31 of the Union List The manufacture or the licensing of amplifiers or the control of their ownership or possession, including the regulating of the trade in such apparatus is one matter, but the

1. (1882) L.R. 7 A C 829.
2. (1959) S C J 485 : (1959) M.L J (Crl) 309

control of the 'use of such apparatus, though legitimately owned and possessed, to the detriment of tranquillity, health and comfort of others is quite another It cannot be said that public health does not demand control of the use of such apparatus by day or by night, or in the vicinity of hospitals or schools, or offices or habited localities The power to legislate in relation to public health includes the power to regulate the use of amplifiers as producers of loud noises when the right of such user, by the disregard of the comfort of, and obligation to, others, emerges as a manifest nuisance to them

The pith and substance of impugned Act is the control of the use of amplifiers in the interests of health and also tranquillity, and thus falls substantially (if not wholly) within the powers conferred to preserve, regulate and promote them and does not so fall within the Entry in the Union List, even though the amplifier the use of which is regulated and controlled is an apparatus for broadcasting or communication "

The learned Judge refers with approval to the observations of Latham, C J., of Australia in *Bank of New South Wales* v. *The Commonwealth*[1] :

" A power to make laws ' with respect to ' a subject-matter is a power to make laws which in reality and substance are laws upon the subject-matter It is not enough that a law should refer to the subject-matter or apply to the subject-matter , for example, income-tax laws apply to clergymen and to hotel-keepers as members of the public , but no one would describe an income-tax law as being, for that reason, a law with respect to clergymen or hotel-keepers Building regulations apply to buildings erected for or by banks , but such regulations could not properly be described as laws with respect to banks or banking "

Considerable reliance was laid by the learned Counsel Mr. V G. Rao on a passage in the judgment in In re *N. V Natarajan*[2], already referred to, for his contention that the subject of the impugned legislation is national honour, a matter wholly outside the competence of the State Legislature The learned Judge, Veeraswami, J., while referring to the veneration with which the nation looked upon the National Flag, the Father of the Nation, and the Constitution, has stated

"The essence of the Act is the legislative recognition of the facts that Mahatma Gandhi as the Father of the Nation, the Indian National Flag which symbolises the sovereignty of this country and the Constitution of India, which is the supreme document and which enshrines the set up of the Democratic Republic, the rights and aspirations of the nation and the machineries of the Government are amongst those constituting our national honour and that any of the said acts done wilfully is an insult to the Indian Nation and its honour and is a penal offence While the subject of legislation is the national honour and its purpose is to preserve and protect it from any wilful acts of insult it is obvious that what is basic to the Act is public propriety and orderliness "

We do not read the phrase ' the subject of legislation ' in the passage quoted as referring to the purpose or object of legislation The clauses immediately following negative any such inference The purpose of legislation is public propriety and orderliness, in recognition of the deep consciousness of the community in the matter of the Constitution, National Flag, and the Father of the Nation As in the *Canada Temperance Act case*[3], in the above case, it may be that the Act which is prohibited, which is the gist and crux of the legislation, affects a matter not within the legislative competence of the State But it is not that matter that is the subject of the legislation It may be that it is a subject on which the effect of the legislation incidentally falls, but that is not the real object of the legislation The legislation is not, with respect to national honour, but with respect to an offence in which national honour is involved The purpose of the Act, its pith and substance, is to give statutory recognition to a public sentiment , to penalise that which in the view of the State the community regards as improper and offensive to its sentiments The fact that the subject national honour is not within the State's competence cannot preclude the State from acting within its sphere and making criminal, wrongful abuse of or insult to national honour The *Sound Amplifer's case*[4], above referred to, if we may say so with respect, neatly brings out the distinction

The decision of Chagla, C J , and Gajendragadkar, J , (as he then was) in *Kalidas Athmaram* v *Emperor*[5], a decision under the Bombay Harijan (Removal of Social Disabilities) Act, under the Government of India Act, 1935, may also be referred to The contention there was that the subject-matter of the legislation, the removal of the social disabilities of Harijans, did not form part either of List II or

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1. (1948) 76 C L R 1 at 186
2. (1964) 2 M.L J. 530 (1964) M L J. (Crl.) 666.
3. (1882) L R 7 A C 829
4. (1959) S C J. 485: (1959) M.L J (Crl) 309.
5. A I.R. 1949 Bom. 168.

List III in the Seventh Schedule of the Act. It is not to be found in List I Chagla, C J held that the impugned legislation clearly fell under Item 1 of List III in the Concurrent List, corresponding to the present Item 1 of List III, Criminal law It was observed.

"Now, reading this statute as a whole, it is clear that it was the view of the Legislature that social disabilities from which the Harijans suffer should be removed According to the Legislature, anyone who was privy to the continuance of these social disabilities should be punished, and the Legislature also took the view that the only way that the harijan's status and position could be improved was by punishing those who continued to inflict disabilities upon Harijans Therefore, in passing this Act, what the Legislature has done is to add to the body of criminal law It has created new offences "

Clearly, in our view, the impugned section squarely falls under Item 1 'Criminal Law' in List III, and so is within the legislative competence of the State It has declared an act to be a crime and added to the penal law of the State It is manifest that the legislative purpose is to create a crime and not create for the people emblems of National honour. After decades of struggle and sacrifice the people had already given themselves a Constitution which they were proud of and which symbolised their National honour The Act made punishable any intentional insult to the Constitution The Act became necessary as there was clear threat of such insult from certain quarters We are in entire agreement with Veeraswami, J, in In re *N.V Natarajan*[1], that the impugned section 5, is, in any case, competent for the State Legislature to enact under the head 'Criminal Law' in the Concurrent List We may, in passing, remark, that, though it has not been referred to, it is conceivable that legislation relating to copies of the Constitution may come under Item 39 of the Concurrent List under the head 'Books'.

The State in the alternative relied on the head of legislation, Public Order, Item 1 of List II As it stands and is conditioned, except for the exclusion of the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power, the term is the most comprehensive term and of the widest amplitude, the maintenance of public order within the State being primarily the concern of the State Plenary powers of legislation for the maintenance of public order within the State is to be found defined as "an expression of wide connotation and signifies that state of tranuquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted" Preventive detention for reasons connected with the security of a State and maintenance of public order, etc, is however, found in Item 3 of List III and Preventive Detention for reasons connected with the defence, foreign affairs, the security of India, *etc*, is found in Item 9 of List I According to Mr M K Nambiar, there cannot straightaway be creation of an offence under this head, there must be a law relating to public order specifying rights and duties of the citizens, and only breach thereof could be made an offence under Item 64 of List II Our attention is drawn to various statutes relating to public order which have been passed, like Madras Maintenance of Public Order Act I of 1947, the Assam Maintenance of Public Order Act, 1947, and the Orissa Maintenance of Public Order Act, 1950 We cannot agree. In our view, it will be open under the head Public Order itself to prohibit by punishment any act or conduct likely to disturb peace and public tranquillity or interfere with the placid life of the community

Reference was made to a decision of the Supreme Court in the *Superintendent, Central Prison* v *Dr Lohia*[2] But there the concept of Public Order was considered under Article 19 (2) as amended by the Constitution 1st Amendment Act of 1951. The learned Judge, Subba Rao, J, who spoke for the Court, observes at page 639

"But in India under Article 19 (2) this wide concept of 'public order' is split up under different heads It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence All the grounds mentioned therein can be brought under the general head 'public order' in its most comprehensive sense But the juxtaposition of the different grounds indicates that, though

1 (1964) 2 M L J 530. (1964) M L J (Crl) 666.

2. (1960) M L J (Crl) 340 1960 S C J 567: A I R 1960 S C 633

sometimes they tend to overlap, they must be ordinarily intended to exclude each other "Public order" is therefore something which is demarcated from the others In that limited sense, particularly in view of the history of the amendment, it can be postulated that 'public order' is synonymous with public peace, safety and tranquillity"

The very decision also recognises that an Act need not expressly state that it is for the maintenance of public order and the purpose of the Act may be implied therefrom For the petitioners reliance was placed on the decision of the Federal Court in *Rex* v *Basudeva*[1], a case arising from a detention order made in pursuance of the U P Prevention of Blackmarketing (Temporary Powers) Act, 1947 Blackmarketing was intended to be put down by the Act and in striking down the impugned provision in the Act as outside the competency of the Provincial Legislature, it is observed at page 68

"The learned Advocate-General urged that habitual black-marketing in essential commodities was bound sooner or later to cause a dislocation of the machinery of controlled distribution which, in turn might lead to breaches of the peace and that therefore, detention with a view to prevent such black-marketing was covered by the Entry It is true that the black-marketing in essential commodities may at times lead to a disturbance of public order but so may, for example, the rash driving of an automobile or the sale of adulterated foodstuffs Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot, in our opinion, fall within the purview of Entry 1 of List II Preventive detention is a series invasion of personal liberty, and the power to make laws with respect to it is, in the case of Provincial Legislature, strictly limited by the condition that such detention must be for reasons connected with the maintenance of public order. The connection contemplated must, in our view, be real and proximate, not farfetched or problematical"

But it must be pointed out that earlier with reference to the 'pith and substance' rule at page 68 it is remarked

"Turning to the main question, the learned Judges below invoked somewhat unnecessarily what may be called the pith and substance rule for a true solution of the problem That rule has been evolved by the Judicial Committee for determining whether a particular statute is legislation with respect to matters in the one or the other of the Lists in Schedule VII No such question arises in the present case The real question is whether the preventive detention provided for in section 3 (1) itself makes no reference to the maintenance of public order"

Legislative competency under the three Lists is one thing, the testing of the validity of any particular Act under the guaranteed fundamental rights is quite a different matter In *State of Rajasthan* v *G Chawla*[2], the Supreme Court has indicated that the Ajmer (Sound Amplifiers Control) Act could be brought conceivably under Entry I of the State List also In *Russel* v. *The Queen*[3], which we have considered rather *in extenso* above, the Temperance Act of Canada is stated to be designed for the promotion of public order, safety or morals. The end and purpose of the impugned legislation, the key to its substance, can be seen from the circumstances in which the Act came to be passed. In the Statement of Objects and Reasons it is set out that certain persons had been threatening to burn the Constitution of India, the National Flag and portraits and pictures of Mahatma Gandhi and to destroy his statutes or otherwise desecrate or insult them, and the Government considered that the action should be put down firmly. No doubt, neither in the Act nor in the Statement of Objects and Reasons do we find any specific reference to a threat to disturbance of public order and breach of public peace. There is noticeable economy in words But the objects whose desecration is made penal are such that one could well infer that it is taken for granted that there will be breaches of public peace and strong protest from the public if the threats are carried out. However, it is unnecessary, in our view, to canvass further the tenability of the legislation under Item 1 of List II, as it could without any difficulty be maintained under Item 1 of List III

We shall next take up for consideration the contention that the measure offends the fundamental rights under Article 19 (1) (*a*) and (1) (*f*) of the Constitution. Learned Counsel contends that section 5 of Act XIV of 1957 completely prohibits with-

1. (1950) S C J. 47 : 1949 F C R. 657 : A I.R. 1950 F.C. 67 (68).
2 1959 S.C J 485 1959 M L J. (Crl) 309 . A.I.R. 1959 S C 544
3. L.R. 7 A.C. 829

out limitation even peaceful demonstration and that even a mere innocent burning of a copy of the Constitution or part of it is itself made an offence. Learned Counsel submits that burning objects is a recognised and well-known form of protest or demonstration, and the bringing home to the Government and to the public by those who desire to do so, their objection to certain provisions of the Constitution is by a blanket provision wholly penalised. This, it is submitted, is interference with the fundamental rights of freedom of speech and expression, demonstration in whatsoever form being a form of expression or communication of ideas

To start with, we are unable to read section 5 as an unreasonable restraint The freedom guaranteed under Article 19 (1) (*a*) is subject to imposition of reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, their relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. We do not understand learned Counsel as contending that even desecrating or insulting a copy of the Constitution could not be restrained. As we understand him, it is the clamping down by a blanket ban of a known form of demonstration—be it ever so innocent that is questioned Our attention was drawn to the decision of the Supreme Court in *Kameshwar Prasad* v. *State of Bihar*[1], wherein Rajagopala Ayyangar, J., delivering the judgment of the Court observes at page 1170 :

> " Without going very much into the niceties of language it might be broadly stated that a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group It is thus a communication of one's ideas or others to whom it is intended to be conveyed. It is in effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech .. A demonstration might take the form of an assembly and even then the intention is to convey to the person or authority to whom the communication is intended the feelings of the group which assembles It necessarily follows that there are forms of demonstration which would fall within the freedom guaranteed by Articles 19(1) (*a*) and 19 (1) (*b*) It is needless to add that from the very nature of things a demonstration may take various forms , it may be noisy and disorderly for instance stone throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within Article 19 (1) (*a*) or (*b*) It can equally be peaceful and orderly such as happens when the members of the group merely wear some badge drawing attention to their grievances "

Proceeding the learned Judge refers to the decision of the Supreme Court in *Superintendent, Central Prison* v *P M Lohia*[2], and observes at page 1171 :

> " The learned Judge (Subba Rao, J) stated that in order that a legislation may be " in the interest of public order " there must be a proximate and reasonable nexus between the nature of the speech prohibited and public order The learned Judge rejected the argument that the phrase " in the interests of public order " which is wider than the words " for the maintenance of public order " which were found in the Article as originally enacted, thereby sanctioned the enactment of a law which restricted the right merely because the speech had a tendency however remote to disturb public order The connection has to be intimate, real and rational The validity of the rule now impugned has to be judged with reference to the tests here propounded "

Dealing with the impugned rule, the learned Judge observes at page 1172 :

> " The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration, be the same however innocent and however incapable of causing a breach of public tranquillity and does not confine itself to those forms of demonstrations which might lead to that result. "

For the petitioners reference was also made to *Arthur Terminiello* v. *City of Chicago*[3] We do not find how this case can help the petitioners in the context of the present case. There can be no disagreement that for a successful democracy there must be utmost freedom of speech and expression. The citizen should be legally free to argue for the ushering in of what he considers to be the proper language policy by constitutional methods. A democratic Government should in the ultimate be controlled by the consensus of the governed and the process of reaching intelligent popular decisions requires freedom of speech and expression. This is guaranteed by the Constitution subject to reasonable restraints. While there must be freedom of discussion and freedom of opportunity to convince and bring round to one's views others, one cannot overlook that large sections of the community may not be patient at all times with reference to propagation of

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1. A.I.R. 1962 S.C. 1166
2. 1960 S.C.J. 597 : 1960 M.L.J. (Crl.) 340.
3. 337 U.S. 1-37 : 93 Law Ed. 1131.

certain ideas in certain manners and forms. The State in the circumstances would have to solve the problem in the light of the local condition that there is no danger to public order and peace. Freedom of speech and expression guaranteed by the Constitution is not absolute and the very freedom can be enjoyed only in an orderly society As noticed in Corpus Juris Secundum, volume 16, at page 1107

> " Resort to epithets or personal abuse is not in any proper sense the communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act raises no question under the Constitution and there are well-defined and narrowly limited classes of speech, the prevention and punishment of which does not raise any constitutional problem, including the lewd and obscene, the profane, the libellous, and the insulting or fighting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace The right of free speech must be exercised with reasonable regard for the conflicting rights of others and the privilege of free speech does not confer on one individual the right to use that privilege to the injury of another "

Now, the impugned legislation penalises only wilfully burning of any copy or a copy of a part of the Constitution of India, and the word ' wilfully ' is of considerable import in the context of its user. It is not every burning of a copy of the Constitution that is made an offence. ' Wilfully ' there, is not just the equivalent of knowingly or intentionally. It is something more It is burning the Constitution purposely, the purpose getting apparent from the two succeeding words ' desecrates ' or ' insults ' and as revealed by the Short Title to the Act and the Preamble. ' Wilfully ', as we see it, denotes an evil intention and it is found in Stroud's Judicial Dictionary, 3rd Edition, Volume 4, at page 3305, that such is the common use of the word in the English language. ' Wilfully ' in the context does not mean merely intentionally as opposed to accidentally which meaning it sometimes has. In *The Queen* v. *Senior*[1], ' wilfully ' is stated to mean that " the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it ". The paper embodying the Constitution must be burned as embodying the Constitution , there must be deliberation to burn a copy or part of the Constitution with the intention of desecrating or insulting. No doubt if the words ' wilfully burns' stand by themselves, it may take in an innocent burning of the paper containing the Constitution. But the words take their colour from the context. The enactment is not made *in vacuo*. The circumstances in which the Act came to be passed, the object and purpose of the Act as revealed in the Preamble and the other parts of the Act provide the key to the understanding of the language and place a limitation on the words ' wilfully burns '.

In Craies on Statute Law, 6th Edition, at page 177, the principles of interpretation in such circumstances as gathered from the case-law are set out thus : From *Cox* v. *Hakes*[2], the following statement is extracted

> " It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look, not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation ' General words therefore must be understood as used with reference to the subject-matter in the mind of the Legislature and limited to it "

In *Watnery Combe, Reid & Co., Ltd.* v. *Berners*[3], Lord Haldane remarks :

> "That may be so interpreted where the scheme appearing from the language of the Legislature read in its entirety, points to consistency as requiring the modifications of what would be the meaning apart from any context or apart from the purpose of the Legislature as appearing from the words which the Legislature has used, or apart from the general law "

We are on a penal statute and when interpretation of the statute becomes necessary, it should lean towards preserving the liberty of the subject That the word ' burns ' in section 5 of the Act can only refer to burning with an intention of desecrating or insulting in the context of its user, will be apparent from the following illustration given in Maxwell on Interpratation of Statutes, 11th Edition, at page 324 :

> " On the same principle, an Act which prohibited the ' taking or destroying ' of the spawn or fish would not include a ' taking ' of spawn to remove it to another bed, for the word ' destroying ' with which ' taking ' was associated, indicated that the taking which was prohibited was dishonest or mischievous

1. (1899) 1 Q B 283 at 290.
2. (1890) L.R. 15 A.C. 506-529 and Lord Bramwell 522
3. L.R. (1915) A.C. 885, 891.

In an Act which made it penal to ' take or kill ' fish without the leave of the owners of the fishery, the same kind of ' taking ' was similarly held to have been intended "

It is an established principle of interpretation of statute that if very general language is used in an enactment, which it is clear must have been intended to have some limitation put upon it, the Preamble may be used to indicate to what particular instances the enactment is intended to apply—see Craies on Statute Law, 6th Edition, at page 203. If need be, we would read the conjunction ' or ' before ' insults ' in section 5 as ' and' , that the section may read · " Whoever wilfully burns or desecrates and insults ". Vide Maxwell on Interpretation of Statutes, 11th Edition, at page 230 for an illustration where an absurd consequence was avoided and the real intention of the Legislature which was beyond reasonable doubt was effected by reading ' or ' as ' and '

In Frank and Wagnalls' New Standard Dictionary ' insult ' is explained thus " To treat with gross indignity, insolence or contempt, by word or act ; officer an indignity or affront to ;" 'Desecrate' is defined in the Dictionary as " divert from sacred to a common use , give up to sacrilege ; profane, as to desecrate a shrine or holy vessels "

Learned Counsel contends that even if a person burns a copy of the Constitution in the fastness of his own house, he could be held guilty under the section, and the wide sweep of the enactment beyond the needs makes the Act unconstitutional We do not construe the Act like that. The gist of the offence is insult and if insult is to be effective, it has to be conveyed. The law does not take note of uncommunicated or unexhibited ideas or thoughts or feelings. In the Law Lexicon of India, Ramanatha Iyer Edition, page 603, ' Insult ' is explained as being ' active ' like outrage The language is ' whoever insults ', not ' whoever thinks he insults ': insult cannot be taken by a copy of the constitution , it will hurt the millions who pay homage to the Constitution. The burning that is banned is not one intended for absorption of stone walls or for edification of stoic philosopher-spectators. It is a burning that one may expect would provoke and offend those hostile to the idea, while exciting the friendly and sympathetic to extremes of demonstration, with likelihood of violent classes between the two.

The petitioners in this case have pleaded guilty to the charges levelled against them and they have also suffered imprisonment. The convictions have become final and their validity is being questioned only collaterally in the present proceedings, the matter arising under a different context. In *In the matter of Tassadus Ahmad Khan Sherwani*[1], a Full Bench of the Allahabad High Court held that in disciplinary proceedings taken against a member of the legal profession on account of his being convicted of some offence it was not open to the person against whom such proceedings were taken to question the propriety of his conviction. The learned Judges followed the decision of the Judicial Committee in *In the matter of Rajendra Nath Mukherji*[2]. In the circumstances, and in the view we take of the scope of section 5 we do not think it necessary to elaborate further the discussion under Article 19 (1) (*a*) of the Constitution. *Prima facie* as we see on the construction placed on section 5 the restriction must be held to be reasonable and in the interests of public order within the meaning of Article 19 (2) of the Constitution. We are in a democracy and if the sense of the community is outraged by the law it could make itself sufficiently felt in the press and in the Legislatures to put an end to any abuse and can always get the law amended

Nor do we find any substance in the argument that the impugned provisions violate the fundamental rights of the petitioners under Article 19 (1) (*f*) of the Constitution. The contention is that the paper embodying the Constitution is the property of the petitioners and they can do what they please with it. But the fundamental right under Article 19 (1) (*f*) does not prevent the State from making laws imposing reasonable restrictions on the exercise of the right in the interests of the general public.

1 I.L.R. 44 All. 352 (F.B.) 2 I.L.R. 22 All. 49 (P.C.) : L.R. 26 I.A. 242

The petitioners cannot claim any fundamental right to annoy and injure the feelings of large sections of the public by desecrating or insulting a document embodying the Constitution by law established which they venerate and hold dear. A man cannot set fire deliberately to his own cottage with an intention that the conflagration should spread to the neighbouring cottages and plead that he can do what he pleases with his own property. In In re *N. V. Natarajan*[1], the learned Judges rejected the claim for protection under Article 19 (1) (*f*) of the Constitution and we are in entire agreement with the decision.

We shall next examine the contention that the ban by section 25 (1) of the Panchayat Act on a person who has been sentenced by a Criminal Court to imprisonment for an offence involving moral delinquency standing for election as a member of the Panchayat is discriminatory and violative of Article 14 of the Constitution. The discrimination alleged is not based upon anything inherent in the provision itself; what is alleged is that this provision differs from similar provisions in other enactments in respect of elections to local bodies. In the earlier Panchayat Act of 1950 for a disqualification to operate as a ban the sentence of imprisonment should be for a period of not less than six months. Section 49 of the District Municipalities' Act also requires that the sentence of imprisonment by a Criminal Court should be for a period of six months or more. That Act further provides that the offence must be other than that of a political character, and should be an offence involving moral delinquency. The requirement of the Madras District Boards' Act, 1920, is also similar and is found in section 55 of the Act. The Madras City Municipal Act, by section 52 (1) also provides disqualification only on similar grounds. But the Representation of Peoples Act, 1951, by section 7, enacts disqualification for membership to Parliament and the State Legislature in a case where a person has been convicted by a Court in India for any offence and sentenced to imprisonment for a period of not less than two years. In the Representation of Peoples Act, there is no specification that the offence should be one involving moral delinquency. The argument of discrimination is based upon the varying provisions in the matter of elections to the several bodies. We fail to see any discrimination that would come under Article 14, in this matter. First, it must be noticed that there is no such thing as a fundamental right to stand for election to any of these bodies. In respect of each of the electoral bodies particular qualifications are prescribed, and, with reference to any particular electoral body, one does not find any discrimination between one group and another. The different enactments adopt different standards in imposing disqualifications. The Madras Panchayat Act, 1958, by itself, does not discriminate between one class of persons and another class, where both classes of persons are similarly situated. The Act has classified persons, who have been convicted for offences involving moral delinquency. This classification cannot be said to be irrational. It is well settled that, while Article 14 forbids class legislation it does not forbid reasonable classification for purposes of legislation, and the only two tests that classification has to stand are (i) that the classification must be founded on an intelligible differentia, which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the objects sought to be achieved by the statute in question. In respect of Panchayat elections, the electorates are generally closed and compact bodies. The Panchayats are divided into wards, and the members of the panchayat may be expected to be in close contact with their voters. They have to command the confidence of the villagers, the anonymity and impersonality which without much difficulty could be had in town life will be hard to be retained in villages, and the Legislature might well have thought that, in such circumstances, any imprisonment, provided it involved moral delinquency, should disbar a candidate from membership. In our view, the argument based on Article 14 is wholly untenable

We shall now take up for consideration the question whether the convictions in the two cases can be said to be for offences involving moral delinquency. The expression 'moral delinquency' has not been defined specifically anywhere, and the

1. 1964 M.L.J (Crl.) 666 (1964) 2 M.L.J. 530

principal argument strongly pressed before us is, that there is a distinction between offences against what may be called crimes against society and what the State may declare as offences in respect of political agitations The learned Counsel contends that the offences in question are just acts of civil disobedience by certain citizens, whose moral convictions in regard to certain policies of the Government compelled them to protest againt them openly and publicly. These citizens willingly courted imprisonment for their convictions. It is submitted that the motives which led these people to the acts in question cannot be stated to be base ones, nor the persons be labelled to be of a depraved character.

Our learned brother, Srinivasan, J., who dealt with the writ petition, out of which the Writ Appeal arises, has observed:

"The Constitution, it is said, embodies high moral and spiritual values, to which an Indian citizen pays homage, and the public destruction of such a document, whatever might be the reason which impelled the person doing so, cannot but wound the deep-seated sentiments of the members of the public. It may be that there is one section of the public which does not regard the Constitution in that light, but when there is an equally large, if not larger, section of the public, which does so, the act of burning the Constitution was intended mainly to wound the susceptibilities of a large section of the public."

We shall first consider the three cases of this Court, which have dealt with the question of moral delinquency or turpitude with reference to the Panchayat Act. Of the three cases, the only case, where there is reference to an argument based upon the offence being of a political character, is the one in *Chelladorai* v. *Sornam*[1]. But the actual conviction in that case was one under section 120-B read with sections 109 and 129 of the Indian Penal Code, and sections 4 and 5 of the Explosive Substances Act, and the question did not really arise for consideration, as it was found that the revision petition could be disposed of on another point. The learned Judge, Anantanarayanan, J., in examining as to when an offence could be stated to be one involving moral delinquency, observed:

"For, we shall then have necessarily to be embroiled in the argument what a 'political' offence is, and that would be even more difficult to define In my view, applying the approach of negative exclusion, which may be fruitful in such cases, it is clear enough that all technical and formal offences, and offences not involving *mens rea* would be automatically excluded Next, an offence like a rash and negligent act causing the death of a person, may be presumably excluded, for though rashness and negligence are states of mind, they do not involve a guilty intention, and are not states of mind *per se* transgressing, the moral law But where such an offence as criminal conspiracy, or waging war against an established Government (Government of India—section 121, Indian Penal Code), is committed it is very difficult to accept the validity of the decision that 'moral delinquency' is not involved, because the motive is not personal, but political After a careful consideration of this aspect, I am inclined to feel that any grave criminal offence, which involves an element of guilty knowledge, and which thus transgresses the majesty of the law of crimes, will necessarily involve also an element of 'moral delinquency' because of its anti-social content"

While in a broad and general way the principle thus set out may be helpful, difficulty will arise in finding out the content of the expression "grave criminal offence". But the other element indicated, *viz.*, anti-social content, is a matter which the Courts, which ultimately will have to find out which offence involves moral delinquency, can examine, when the relevant matters also are placed before them.

The next decision, *Easwaramurthy* v. *District Munsif, Ambasamudaram*[2], arose, out of the further stages of the above case. It is found from this case that the acts of which the petitioner was held guilty involved offences of criminal conspiracy to set fire to and blow up railway bridges and the like Clearly, the anti-social element is apparent. The offences, though it may be in pursuance of a political object, are grave offences under the Indian Penal Code.

In the third case, *Karuppiah* v. *Inspector of Panchayat and Collector of Ramanathapuram*[3], when a Receiver in a Civil proceeding was taking steps to remove paddy from a place where it had been stored, the Villagers prevented the Receiver from discharging his duties. The President of the Panchayat was part of that crowd,

1. (1964) 1 M.L.J. 55 at 57. 590
2. (1964) 2 M.L.J. 426: (1964) 1 M.L.J. (Cal.) 3. (1965) 2 M.L.J. 137.

and in the criminal case, the learned Sessions Judge of Ramanathapuram had observed :

" He (the President) had no personal interest in the matter and he has joined the unlawful assembly of the other accused in protesting against the carrying away of the paddy, as he was the President of the local Panchayat interested in the other accused "

When considering the question whether the President had become disqualified by reason of the conviction, and whether the offence was one involving moral turpitude, the learned Judge, Venkatadri, J., after referring to the two cases above cited, held that neither the conviction nor the punishment of the President in that case of imprisonment till rising of the Court, involved any moral delinquency.

The Supreme Court had occasion to consider what would amount to moral turpitude or delinquency, when examining whether an Advocate was guilty of professional misconduct in In re '*P*' *an Advocate* [1]. Therein it is observed :

"It may be that before condemning an Advocate for misconduct, Courts are inclined to examine the question as to whether such gross negligence involves moral turpitude or delinquency In dealing with this aspect of the matter, however, it is of utmost importance to remember that the expression 'moral turpitude or delinquency' is not to receive a narrow construction Wherever conduct proved against an Advocate is contrary to honesty, or opposed to good morals, or is unethical, it may be safely held that it involves moral turpitude."

In Ramanatha Iyer's Law Lexicon of India we find moral turpitude explained thus :

" Anything done contrary to justice, honesty, principle or good morals , an act of baseness, vileness, or depravity in the private and social duties, which a man owes to his fellow man, or to society in general contrary to the accepted and customary rule of right and duty between man and man .... "

In Corpus Juris Secundum, Volume 53, while dealing with libel and slander, at page 104, referring to what crimes involve moral turpitude, it is stated .

" What crimes involve moral turpitude has been the subject or vast contention, extending from the view that moral turpitude inheres in every wilful breach of criminal statute to the position that only those crimes that present such vileness and depravity as arouse the abhorrence of all mankind are intended A scriptural inhibition has been thought sufficient by some Courts conclusively to ascribe moral turpitude depends on the conception of the community It has been defined as an act of base- ness, vileness, or depravity in the private and social duties which a man owes to his fellow man or society in general, contrary to the accepted and customary rule of right and duty between man and man."

In the foot-note it is stated thus

" Moral turpitude need not be inherent in the nature of the crime itself It may spring, as here, from an alleged violation of a criminal statute prohibiting under pain of punishment the commission of certain acts."

A reference to the American authorities shows that the term moral turpitude which is not different from moral delinquency, is not a new term, but has been the subject of consideration for centuries. It is found in Roman Law. In ancient Rome *infamia* was a loss of civic honour and was a device by the Preators to enforce equitable duties . and *turpitude* meant that one was in fact unworthy of civic honour, so that this circumstance was to be taken into account in the exercise of discretion, for example, in the appointment of a guardian. The censor had power in the Roman Republic to note persons as infamous where their conduct or mode of life was out of accord with good morals. *Bone mores* were an agency of social control preserved and given effect by censorian power.

In Corpus Juris Secundum, Volume 58, giving some of the definitions of 'moral turpitude', it is stated (at page 1201)·

" The term has also been defined as meaning anything done contrary to justice, honesty, principle, or good morals, anything done knowingly contrary to justice, honesty or good morals."

Proceeding, it is found stated therein

" As a legal term, moral turpitude is defined as the quality of a crime involving grave infringement the moral sentiment of the community as distinguished from statutory *mala prohibita.*"

After further definitions, it is stated :

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1 (1963) 2 S.C.J. 708: A.I.R. 1963 S.C. 1313 at 1316

" Considerable difficulty has been experienced in application of the term ' Moral turpitude ' to the facts of each case One of the reasons for this is that the term does not refer to legal standards, but rather has reference largley to moral character and state of mind, to those changing morals standards of conduct which society has set up for itself through the centuries Since standards of moral differ from time to time and at different places, and the concept of moral turpitude depends to some extent on the state of public morals, and is to be determined by the state of public morals and the common sense of the community, and since ' moral turpitude ' is a term which conforms to, and is consonant with, the state of public morals, it never can remain stationary, but it may vary according to the community or the times It follows therefore that moral turpitude is adaptive, and is a somewhat loose expression, the meaning of which must be left to the process of judicial inclusion and exclusion as the cases are reached and as the standards of society change "

This statement, in our view, sets out the true position

The phrase ' moral turpitude ' has been widely employed in the United States in legislation dealing with immigration, disbarment, revocation of physicians' licences, defamation, and credibility of witnesses, and latitude of interpretation enabled Courts to punish offenders who might under a less elastic terminology virtually escape unscathed.

In *Baleshwar Singh* v *District Magistrate and Collector*[1], a question for consideration was whether the giving of false information to a public servant, an offence under section 182 of the Penal Code, involved moral turpitude and so disentitled a person to get elected to the Panchayat. The learned Judge, Tandon, J., observes in this connection (page 74) :

" Every false statement made by a person may not be moral turpitude, but it would be so, if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellowmen or to the society in general If, therefore, the individual charged with a certain conduct owes a duty either to another individual or to the society in general, to act in a specific manner or not to so act, and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity It will be contrary to accepted customary rule and duty between man and man "

The question as to when an offence could be considered as involving moral turpitude has been the subject of detailed consideration by a Full Bench of the Allahabad High Court, in *Buddha Pitai* v. *S.D.O* [2], where a candidate for Panchayat election had been convicted under the Prevention of Food Adulteration Act, a social legislation, for vending an article of food containing prohibited colouring matter The learned Chief Justice and Sharma, J., took the view that the offence in question did not involve moral turpitude, while the other learned Judge differed. The learned Chief Justice observes (at page 386)

" So an Act which is not immoral may be punished as an offence The duty not to use metanile yellow as a colouring matter in a food article arises exclusively from a statutory provision and there is no element in it which can be said to be not capable of legal enforcement or cognizance It follows that there is nothing immoral in the use of metanile yellow in a food article I consider it illogical to hold that every offence made punishable under the Act involves moral turpitude just because the object behind the Act is to prevent adulteration of food Every act of mixing a substance with an article of food is not necessarily immoral Whether it is or not would depend upon the motive, if the motive is greed it may be immoral, but not if it is simply to make the article more attractive or more delicious When a person mixes a prohibited colouring matter in an article of food he may do it only to make it more attractive or more delicious "

The other learned Judge, Beg, J , who dissented from his colleagues in the opinion, observes (page 393)

"The expression 'offence involving moral turpitude' in clause (*h*) of section 5-A of the Act to my mind merely means that the offence should be such as to have the effect of embarrassing a man socially by lowering him in public estimation If an offence is such that the community regards a person convicted of such an offence as one who has committed breach of social duties or obligations which a man owes to his fellowman or one who has acted dishonestly or against the established moral standards of honesty and integrity of accepted rules of good conduct, then conviction for such an offence would involve moral turpitude The important question, therefore, is not what the ingredients of the offence are, but how the community at large views the offence "

The learned Judge, Sharma, J , remarks (page 400)

" One of the tests for determining the nature of the offence is to see whether it shocks the conscience of or is scorned at by the public or the society at large Whether an offence involves moral

1. A.I.R. 1959 All. 71 at 74.
2. A.I.R. 1965 All 382.

turpitude will depend on its nature and the circumstances in which it is committed. An offence of a certain class may generally be considered to involve moral turpitude, but may not be so if committed in particular circumstances ... ..."

It will be seen that substantially the approach is the same, the difference comes in the application to particular facts. While we agree with the above observations of the learned Judge, Sharma, J., we find it difficult to follow up with one of the illustrations given. We cannot agree that a murder, if committed in a spirit of patriotism, will be an exception. It may be that patriots of the revolutionary type, who had committed murders of alien rulers, might have been applauded by sections of the community as heroes. But murder will not cease to be murder, if it is an offence under the Penal Code. Killing is permitted in war, but not in times of peace. An assassin will never be applauded by right-thinking men, and certainly the moral Code of India, as we see it does not approve of it. Nor can we see any exception in respect of offences by political parties in furtherance of political agitations. There may be all sorts of political organisations or forces in a country and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will be furthering their political ends. But if there is an established Government, standing apart, concerned in the enforcement of the criminal law, we cannot see how there can be a blanket exception in respect of political crimes. Nor is it possible to define with precision what a political crime is, certainly it is not just a crime by a politician. The so-called political crimes too will have to be judged in the light of the principles above enunciated—whether the offences are shocking and abhorrent to a large body of right-minded citizens.

We may here usefully refer to a passage from Rescoe Pound's Jurisprudence, Volume II, Part 3, at page 269:

"At the end of the eighteenth century natural law jurists had much to say about a 'right of revolution', or, if one is to use juristic terminology, for a political idea, a liberty of revolution. Analytical jurists, on the other hand, have been zealous to point out that resistance to a law may be moral but cannot be legal. The 'right of revolution' depends upon the natural law idea that the obligation of a legal precept depends upon its conformity to a moral precept, upon the political juristic theory that the individual conscience is the ultimate moral and hence legal arbiter. This way of thinking belongs to the extreme abstract individualism of the end of the eighteenth century which took no account of the social interest in the security of political institutions as social institutions. It made the individual the final Judge of his legal as well as of his moral duty to yield obedience to political authority."

Surely in no modern State can the individual contend that he is the final judge of his legal as well as of his moral duty.

It is difficult to postulate and lay down any hard and fast rule or enunciate any cut-and-dried principle as to what crimes may be said to involve moral delinquency. As a concept, it does not lend itself to any precise definition. Frankly, it depends on the ultimate authority which has to struggle to make articulate the norm or standard of moral behaviour which society expects at any particular period, in any particular case. A fair working rule may be phrased thus: Morals and standards of social behaviour, the duties which one human owes to his fellow being or to the society, are potential materials for the legislator, and, if the breach of the then current moral or social code is also, according to law, an offence, the offence could generally, without probe into its innate character, be held to involve moral delinquency. Difficulty will arise in analysing what laws reflect the moral sense of the community and drawing the line between offences involving moral turpitude, that is, containing in their ingredient an element of lapse from moral standards, and those not so tainted. Also laws are generally permanent, but moral ideas and standards change, and at times change very fast. Law lags behind, and antiquated laws may stand unchanged penalising what a progressive advanced society considers highly moral and ethical. Some laws may have no relation to ethics or morals, others may have relation to moral values, but in advance of the moral sense of the generality of the body politic. Again, standards in certain facets of moral conduct, and probity would differ according to the place which the delinquent fills, or is to fill in society, his trade, occupation or profession. Higher standards, and sometimes the highest standards of probity and good conduct are called for in certain professions and places of office and power.

That heavy punishments are provided for particular offences and law considers them as grave crimes may not always be conclusive of the existence of moral turpitude in the offence, though it may indicate that the act must be inherently of the vilest character. Nor can the severity of the punishment actually meted out in any particular case, or its lightness, determine the issue one way or the other One element there must be for an offence to take in the taint of moral turpitude—the act must be regarded as immoral or disreputable, unworthy and discreditable in an honest citizen, and discountenanced by society, regardless of whether the act is punished by law as an offence. But bad motive is not a necessary ingredient for being guilty of moral turpitude , a man's view may be perverted and a negation of what society at large considers as moral The following passage from *State* v *Malusky*[1], in Corpus Juris Secundum, Volume 58, at page 1204 is worth quoting in this context .

" However much every man may be answerable for his acts to his own conscience, society cannot permit each individual to say for it what is moral and what is immoral To him who lives only for the gratification of his appetites, there is no immorality in doing so Some standard must exist according to which the determination as to whether act or conduct is moral or immoral is to be made That standard is public sentiment—the expression of the public conscience It may be manifest, unwritten, and more or less nebulous, as legend, as tradition, as opinion, as custom, and finally crystallised, written as the law Thus the standard is fixed by the consensus of opinion, the judgment of the majority. When the majority is slight, there is, of course, greater opposition on the part of the minority to the standard The majority may become the minority and the standard change But, so long as it is established, measurement must be made according to its terms "

On ultimate analysis the position resolves to this : whenever the question arises whether a particular offence involves moral delinquency, the particular case will have to be decided on its own facts, and the conclusion will have to be in accordance with the public morals of the time and the commonsense of the community as ultimately judicially interpreted. Here again, the context and the purpose for which the character of the offence has to be determined will have a bearing on the matter. The question has to be approached not in an abstract fashion, but bearing in mind the implications of the particular offence, and the requirements and object of the statute for which the moral element has to be assessed.

Applying these principles, we have no hesitation in holding that the offence in question of which the petitioners have been found guilty are offences involving moral delinquency. The phrase ' moral delinquency ' in section 25 (1) of the Panchayat Act cannot be given a narrow construction. Any offence that would have the effect of embarrassing a man socially by lowering him in public estimation and affecting his reputation must be held to be an offence involving moral delinquency under that provision. We have earlier discussed the nature of the offence in question , the offence is *a mala in se*, and a person who acts in callous disregard of the just and natural feelings and sentiments of large sections of the public and shocks their conscience, must forfeit all claim to their esteem While it would be open to any citizen to agitate in a constitutional manner for amendment of the Constitution, the Constitution itself providing for its amendment, the Constitution as such will be entitled to the highest regard and respect. After the elections, members of the panchayat are, under section 27-A of the Panchayat Act, required to take oath or affirmation to bear true faith and allegiance to the Constitution of India as by law established, and so the petitioners, if elected, will have to swear or affirm faith and allegiance to the Constitution of India as by law established How can they honestly reconcile themselves to swear allegiance to the Constitution, if they wilfully insult the Constitution ? In our view, when a person is convicted for an offence under section 5 of the Insults to National Honour Act, and sentenced to imprisonment, section 25 of the Panchayat Act of 1958 would clearly ban the entry of such a person into the body of the panchayat as its member

The facts and circumstances of the two cases also do not give room for a different conclusion The appellant in W A No. 260 of 1965 was specifically charged with the intention of causing insult to the Constitution of India at a public place, may be in pursuance of the anti-Hindi agitation of the D.M K party. It is seen from the records that the appellant is a prominent member of the said party and there

1. 230 N W. 735 : 71 A.L R 190.

was no denial of the charge He pleaded guilty and was convicted to undergo R I. for six months. He has not chosen to question the validity of the conviction on merits. There was no plea then that on the facts there could be no conviction In the other case, the petitioner was charged along with others under sections 120-B, 143 and 188, Indian Penal Code read with section 109, Indian Penal Code and sections 5 and 6 of the impugned Act XIV of 1957 The petitioner along with four others is stated to have marched in a body to a public place and there taking out a copy oft he Part XVII of the Constitution set fire to it with match sticks The petitioner was warned by the police and there was a police ban under section 30 of the Police Act. Notice had been issued to the petitioner not to take out any procession or hold a public meeting without a licence The petitioner withothers had sent previous intimation to the Police that they would be publicly burning a copy of the Constitution As in the other case the petitioner pleaded guilty and had been sentenced to six months' R.I The conviction was not challenged either on law or on the merits and the petitioner has undergone the period of imprisonment In these circumstances on the principles discussed above we have to hold that the petitioners in the two cases have been convicted for offences involving moral turpitude

It was pointed out that in some cases nomination papers of persons similarly convicted have been accepted We do not know the actual facts or the circumstances in which the offence was found in those cases. We have held a mere burning of a copy of the Constitution in the absence of any intention to desecrate or insult the Constitution will not be an offence under the Act The fact that in certain other cases the nomination papers have not been rejected, is in the circumstances neither here nor there No doubt in W.P No. 751 of 1965 the Election Officer who had to exercise his discretion and scrutinise the nomination paper has surrendered his discretion to the dictates of the Returning Officer. But we see no useful purpose can be served by quashing the order of the rejection of the petitioner's nomination paper in the circumstances of the case. We have to hold on the merits that the nomination paper could be validly rejected, the offence of which the petitioner has been convicted being one involving moral delinquency. Besides admittedly no election has been held for the ward in question

In the result Writ Appeal No 260 of 1965 fails and is dismissed with costs of the Government Pleader (Additional) Writ Petition No 751 of 1965 is also dismissed and the Rule *nisi* is discharged, but in the circumstances there will be no order as to costs

V.K. ——— *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Contempt Jurisdiction.)

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE P RAMAKRISHNAN.

Advocate-General of Madras . *Petitioner**

v.

Sri Amanullakhan, Advocate, Market Street, Fort, Salem-1 . *Respondent.*

Contempt of Courts Act (XXXII of 1952), *section* 3 (2)—*Scope—Offence under section* 228 *of Penal Code and offence of Contempt of Court—Distinction between—Bar of section* 3 (2)—*Applicability*

Penal Code (XLV of 1860), *section* 228—*Offence under—Ingredients*

A Counsel defending an accused in a criminal case was alleged to have stated to the presiding Magistrate " we know what is taking place and we know how to deal with your Honour We cannot tolerate the attitude of this Court in supporting the prosecution like this "

Held, if the words complained of had been used it would certainly amount to an actual Contempt of Court punishable under the Contempt of Courts Act and not merely to an offence punishable under

* Contempt Appln No 1 of 1966 13th April, 1966

section 228 of the Penal Code and hence the bar of section 3 (2) of the Contempt of Courts Act would not apply to such a case

The essential ingredients of the offence under section 228 of the Penal Code are (1) intention, (2) insult or interruption to a public servant and (3) the fact that the servant concerned was then sitting in any stage of a judicial proceeding If the averments go beyond that and scandalise the Court itself and further impair the administration of justice they amount to contempt of Court and not merely to the offence punishable under section 228 of the Penal Code

However, since in the instant case there was no satisfactory proof about the exact expression said to have been used by the Counsel he cannot be held to be guilty of contempt of Court or even of intentional insult to the presiding officer

Contempt Application praying that this Court be pleased to take such action as it thinks fit and necessary and pass suitable Order.

The Government Pleader, on behalf of Petitioner.

S. Mohan Kumaramangalam for *Fyzee Mahmood*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, O.C.J—The respondent in these proceedings is Sri Amanullakhan, a member of the Salem Bar, and the proceedings have been initiated by the learned Advocate-General under section 3 of the Contempt of Courts Act, XXXII of 1952 and Article 215 of the Constitution of India. We may here briefly state that the proceedings have been thus initiated upon a report by Sri K P. Madhavacharya, Additional First Class Magistrate (I), Salem, whose affidavit is on the record. Equally there are two affidavits on record, on behalf of the respondent, the first being that of the respondent himself, and the second that of a member of the Salem Bar, Sri P. S. Mari Chetty, who claims to have been present on the occasion of the incident which led to the contempt proceedings.

A very brief conspectus of the facts, as set forth in the affidavit of the Magistrate, will be sufficient. The Magistrate states that, on 28th June, 1965, after he pronounced judgments in three cases convicting the concerned accused under section 4 (1) (*a*) and (*b*) of the Madras Prohibition Act, he took up C.C. No. 2896 of 1965 for trial, in which the accused was one Kaliammal charged under section 4 (1) (*a*) of the Madras Prohibition Act, and defended by the respondent (Sri Amanullakhan). The affidavits on record make it abundantly clear that one of the matters in controversy was the actual capacity or volume of the particular container (M.O. 1) which was alleged to have contained illicit liquor, apparently, this was a point of some significance, as impinging on the credibility of the evidence for the prosecution. It is however clear that the Sub-Inspector of Police, the Investigating Officer, who was in Court, was permitted to make a suggestion to Court about the capacity of this receptacle, based on the measure (4 kg.) printed on the outside. The respondent seems to have strongly objected to this, because the Magistrate was inclined to act on the suggestion of the Sub-Inspector, by permitting a re-examination of the witness, and the point of the respondent was that it was illegal thus to permit an officer, who had conducted the investigation, to take part in the trial. As far as we can gather from the record, the point of objection urged by the respondent had much plausibility and force behind it, and we are satisfied that the respondent was *bona fide* concerned for the consequences of a procedure, with regard to his client, which seemed to him, to be illegal.

However that might be, the further version of the Magistrate is that, at this juncture, the respondent (Sri Amanullakhan) burst forth into a violent demonstration in Court, and also flung the container (Dalda tin) on the table of the Magisterial Clerk, and generally conducted himself in such an undignified and disorderly manner, as to interrupt the proceedings. The respondent is then supposed to have uttered some words, which the Magistrate has quoted and set forth in page 3 of his affidavit. The following sentences have to be particularly stressed as, indisputably, they may amount to insult of Court or contempt of Court, if they had been the precise words used by the respondent. They are :

"We know that what is taking place and we know how to deal with your Honour . . Hereafter we know how to deal with you. We cannot tolerate the attitude of this Court in supporting the prosecution like this."

The learned Government Pleader contended that if these words were the actual words used by the respondent, they go beyond mere insult, since the words are levelled as accusations against the administration of justice in the Court, and are likely, by their effect, to bring that administration into disrepute. According to the learned Government Pleader, this certainly constitutes contempt of Court, and not mere interruption of Court and insult to the Officer, which would be a separate offence punishable under section 228 of the Indian Penal Code. The affidavits of the respondent and the member of the Bar who was then present, contain a flat denial of these allegations. According to those affidavits, the respondent no doubt kept the container (tin) on the table of the Magisterial Clerk, because the respondent wanted the container to be weighed, for purposes of argument. This the respondent did, after vehemently protesting against the illegal procedure of the Magistrate in permitting the Investigating Officer to make a suggestion, and, to participate in the trial We have no doubt whatever, that, at this stage, the respondent must have got heated, and that an incident immediately followed, of the character of what is described in ordinary parlance as a 'breeze' between the Court and the advocate. But, according to the counter-affidavits, the respondent did *not* utter the words that we have earlier set forth *verbatim* as appearing in the affidavit of the Magistrate. On the contrary, he merely stated, no doubt in an emphatic way, that the Magistrate ought to be fair to the defence, and ought to give the defence every opportunity to prove the innocence of the accused.

Sri Kumaramangalam for the respondent has put forward two main arguments, each of which may be separately and briefly discussed. The first argument is that, even assuming that the words were uttered precisely as alleged by the Magistrate, that is, that these are *ipsissima verba* of the respondent correctly set forth, nevertheless, proceedings under the Contempt of Courts Act would be not merely misconceived, but barred, by the operation of section 3, sub-clause (2) of that Act. Section 3 (2) states categorically, that:

"No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it, where such contempt is an offence punishable under the Indian Penal Code"

Sri Kumaramangalam argues that, on the averments, the respondent could only be held to have committed the offence punishable under section 228, Indian Penal Code That being the case, the learned Magistrate could have acted only under the relevant sections of the Criminal Procedure Code, in respect of such an offence committed before him, which are sections 480, 481 and 482, Criminal Procedure Code read along with section 475, Criminal Procedure Code. In other words, if the Magistrate was exercising the discretion to instantly punish the person committing the offence under sections 480, 481, Criminal Procedure Code the alleged offending words would have been embodied in a proceeding, on the spot. If the respondent had actually uttered them he could hardly have denied them at that stage, and he would have no option left but to throw himself on the mercy of Court. But even, if on the contrary, the Court thought that it should make a report or complaint, that should be done very expeditiously thereafter under section 482, Criminal Procedure Code. The jurisdiction of the Courts under the Contempt of Courts Act being thus barred, there is no further room for action against the respondent, according to Sri Kumaramangalam. He relies upon a very similar case, reported in *State of M.P.* v. *Revashankar*[1], where their Lordships have enunciated the principle of the bar under section 3 (2) of the Contempt of Courts Act, where what was really committed was an offence punishable under the Indian Penal Code.

The other part of the argument of learned Counsel is that the facts have to be strictly proved, and that the affidavit of the Magistrate cannot, in any event, be conclusive evidence of the words said to have been uttered by the respondent, here,

1. (1959) S C J. 86 : A.I R. 1959 S.C. 102.

it is stressed that the affidavit or report, whichever it may be termed, was admittedly drawn up two days after the incident had occurred. Further, the Magistrate himself explicitly states,

> "I have mentioned what I am able to remember among the many other violent expressions made by him "

As against this evidence, we have the evidence of the two affidavits of the respondent and his colleague, and it is stressed that this Court cannot, by any means, now hold that the precise expressions complained of were used, or even words to that effect.

As regards the first argument, we do not think it is substantial, if the words quoted by the Magistrate were the precise words used by the respondent As their Lordships observed in *State of M P.* v. *Revashankar*[1], the essential ingredients of the offence punishable under section 228, Indian Penal Code, are (1) intention, (2) insult or interruption to a public servant and (3) the fact that the servant concerned was then sitting in any stage of a judicial proceeding. If the averments go beyond, and scandalise the Court itself and further impair the administration of justice ('Paragraph 9 of the decision) they amount to contempt of Court and not merely to the offence punishable under section 228, Indian Penal Code In the present case, we agree with the learned Government Pleader that, if the words complained of had been used, this will amount to an actual contempt of Court, punishable under Act XXXII of 1952.

But on a careful perusal of the record, we are also satisfied that we cannot act on the conclusion that these precise words had been uttered by the respondent It must be borne in mind that there was a prior background to this particular incident, and that what seemed to the respondent to be a patent illegality, though we are not judging upon the merits of this matter, had occurred just prior to the actual incident No doubt tempers were frayed on both sides, and it is very possible that some heated exchange of observations occurred between the Court and Counsel. Even if the judicial officer were to later attempt to recollect in cold blood, what precisely were the words uttered by Counsel, this would be a matter of considerable difficulty That is all the more the case, when the officer was not making a record immediately but making a record nearly two days after the incident. Further, there is this residue of agreement between the affidavits of both parties before us, that Counsel did, voice a protest against what he considered to be the lack of objectivity in the Court, with regard to the case of the defence. That could have been expressed in a way that may not at all amount to contempt of Court. If it had been expressed in the precise terms of the remarks quoted by the Magistrate, it would be very gravely objectionable. But, in the face of the specific denials in the two affidavits, and, considering the entire circumstances, we are inclined to give the benefit of the doubt to the respondent about the expressions said to have been used. Where there is no proof satisfactory to our mind, that these expressions were used, we cannot hold the respondent guilty of contempt of Court or even of intentional insult of the Presiding Officer. Upon this conclusion, we are of the view that the further proceedings should be dropped , and, the notice issued to the respondent is hence discharged.

The decision cited by the learned Government Pleader in *Homi Rustomji* v. *Sub-Inspector Baig*[2] may be incidentally noted here, as that is also a case where, in the face of conflicting versions, the High Court pointed out that contempt proceedings of a summary nature, were hardly the kind of proceedings that would be appropriate for the decision of difficult questions of fact, in controversy between the parties.

Finally, before taking leave of the case, we desire to add this brief observation, that Courts must see to it that confidence in their objectivity is secured and maintained, because it is essential that justice should not merely be done, but should appear to be done and that, as a matter to be equally stressed by us, legal practi-

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1. (1959) S C J 86 . A I R. 1959 S.C 102 at 105.
2. A.I.R. 1944 Lah. 196.

tioners are not merely agents of parties pleading a particular case, but are officers of Court, expected to assist in the administration of justice, and to sustain unimpaired the dignity of Courts, by all means in their power.

V.K ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S VENKATARAMAN.

Arumuga Mudaliar .. *Appellant**

v.

Annamalai Mudaliar . *Respondent.*

Tort—Defamation—Publication—Joint tortfeasors—If there could be publication by one to the other

Where it is clear that two persons joined together in writing a letter containing defamatory allegations against the plaintiff, it cannot be said that there is publication of the defamatory matter by one to the other because there could be no publication as between joint tortfeasors

Where the letter containing defamatory allegations was sent to the plaintiff by registered post it is apparent that the defendant meant that it should be read by the plaintiff alone Unless it could be established that the defendant should have intended that as a natural consequence of his act that the letter would be read by others, the fact that the letter was under unforeseen circumstances read by others cannot make it a publication to constitute defamation

Appeal against the Decree of the Court of the Subordinate Judge, Vellor in Appeal Suit No 262 of 1960, preferred against the Decree of the Court of the District Munsif of Arni in Original Suit No. 170 of 1959.

G. Jagadisa Ayyar, for Appellant

T R. Ramachandran and *K. Chandramouli*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this Second Appeal. The suit is one for damages of Rs. 500 against the defendant for having defamed the plaintiff by writing the letter Exhibit A-1, dated 5th May, 1958 and publishing it The Courts below find that the matter complained of is highly defamatory to the plaintiff, but that there has been no publication and it is on the latter ground that the suit was dismissed by the learned District Munsif and the dismissal was confirmed by the learned Subordinate Judge on appeal The contention of the appellant's learned Counsel Sri Jagadisa Iyer before me is that there has been publication. That is a question of fact and no reasons have been shown to justify interference under section 100, Civil Procedure Code, with that finding.

The facts necessary for our purpose may be briefly stated The plaintiff was a co-trustee of two temples along with the defendant and was directed to hand over charge of the articles to the defendant on resignation of his office of trusteeship. There were some differences between the plaintiff and the defendant in that connection, and when the plaintiff sent a letter to the defendant, the defendant replied by means of Exhibit A-1 wherein he accused the plaintiff of being a bachelor of highly immoral character and state that he had been put to shame by being beaten with broomstick and filth thrown on his head and that further the plaintiff was a mean-minded man The letter Exhibit A-1 was mostly in the handwriting of one Viswanatha Mudaliar. But there are some corrections made by the defendant and the letter has been signed by the defendant. The defendant, like the plaintiff, was a resident of Nedungal, however, the means adopted by the defendant of sending Exhibit A-1 to the plaintiff was to send it by registered post addressed to the plaintiff as ex-trustee at Nedungal—*vide* cover Exhibit A-2 It so happened, however, according to the plaintiff, that when the postman brought the letter on 7th May, 1958 the plaintiff was not in his house and had gone to the house of his uncle's son Muniswamy Mudaliar who had died just that day in the same village. The plaintiff was preparing a list of the articles to be purchased in connection with

* S A No 921 of 1962. 28th January, 1966.

the funeral ceremonies. The plaintiff would have it that the defendant who was standing in his house opposite pointed the plaintiff to the postman and the postman delivered the letter to the plaintiff when there were a number of persons present nearby. Since the letter was addressed to him as ex-trustee, the plaintiff thought that the letter would only relate to the differences between him and the defendant over the temple, and the plaintiff did not suspect that it would contain any defamatory matter. So, he asked witness Arumuga Mudaliar (P.W. 1) to read the letter though the plaintiff was a literate and could read it himself. P.W. 1 read the letter and stopped at the defamatory portion. But P.W. 1 encouraged him to read on, and it was read fully. The people present there laughed. This was on 7th May, 1958.

The plaint alleges that the publication took place in two ways (1) by asking Viswanatha Mudaliar to write it; and (2) by delivering the letter in the presence of the villagers and relations and having it read.

The defence was that Viswanatha Mudaliar was solely responsible for the letter, that the defendant had asked Viswanatha Mudaliar not to post the letter till the defendant had consulted an Advocate at Arni, but in collusion with the plaintiff Viswanatha Mudaliar had posted the same. The defendant denied that he pointed the plaintiff to the postman.

Both the Courts concurred in disbelieving the defence by which the defendant sought to escape liability altogether for the authorship of Exhibit A-1. They pointed out that the defendant had made corrections in Exhibit A-1, had signed the letter and had addressed the envelope Exhibit A-2 with his own hand. They rejected the case of the defendant that some other innocuous letter had been enclosed in that envelope and had been replaced by Exhibit A-1 by the plaintiff getting it collusively from Viswanatha Mudaliar. On the question of publication they held that the letter Exhibit A-1 was prepared jointly by the defendant and Viswanatha Mudaliar, that they were therefore joint tortfeasors and therefore there could be no publication in law as between them On the second method of publication relied on by the plaintiff, they rejected the case of the plaintiff that the defendant pointed the plaintiff to the postman. They have not specifically rejected the evidence that the letter was delivered to the plaintiff when he was in his uncle's house and it was read out at his instance by his friend P.W. 1 and that a number of persons heard it. But the Courts pointed out that the defendant could by no means have anticipated that the letter would be read and published in such a manner —he had taken the precaution of sending the letter by registered post addressed to the plaintiff personally.

Now the learned Counsel for the plaintiff was at great pains to dislodge the finding of the Courts that Viswanatha Mudaliar was a joint tortfeasor with the defendant and he referred in that connection to the test which has been laid down to determine when persons are joint tortfeasors. Thus quoting The Koursk, 1924, page 140, it is stated in Winfield on Tort in Chapter 29

"Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design .. but mere similarity of design on the part of independent actors, causing independent damage is not enough, there must be concerted action to a common end"

See also Anand and Sastri, Chapter III, page 282, 1952 Edition. But I do not see any reason to interfere in Second Appeal with the finding, which is one of fact, that Viswanatha Mudaliar and the defendant were joint tortfeasors. There is at least some evidence in support of that inference and it is not open in Second Appeal to weigh the quantum of evidence The evidence principally relied on by the Subordinate Judge is Exhibit A-8, the statement of the defendant as accused in the criminal case of defamation launched in the same matter by the plaintiff, wherein the defendant had stated that both he and Viswanatha Mudaliar conferred together and wrote the letter. There is not sufficient evidence to show that Viswanatha Mudaliar was not a joint tortfeasor and was simply used by the defendant to write out what the defendant dictated.

Once it is held that Viswanatha Mudaliar was a joint tortfeasor with the defendant, the finding that in law there could be no publication by the defendant to Viswanatha Mudaliar cannot be questioned and has not been questioned by the learned Counsel for the appellant. That position is supported by the two decisions quoted by the learned Subordinate Judge, namely, *Doraiswami* v. *Kanniappa*[1] and *Travellion and Clark* v. *A. Minck*[2].

As regards the second method of publication, there is no reason to interfere with the finding of the Courts below that the defendant did not point out the plaintiff to the postman and could not have anticipated that the plaintiff would not be in his house at the time of delivery and that the letter would be read out in the presence of persons other than the plaintiff. It may be noted that P.W.1 who was by the side of the plaintiff does not say that the defendant pointed the plaintiff to the postman, though P.W. 1, speaks to the presence of the defendant in the opposite house. It is obvious that the defendant could not have known when he posted the letter that the plaintiff's uncle would die and that at the time of the delivery the plaintiff would be in his uncle's house and that the letter would be delivered there and would be read out to others by somebody other than the plaintiff. The defendant cannot therefore be held responsible for the actual publication which resulted in that manner By taking the precaution of addressing the letter by registered post to the plaintiff, he took reasonable care to ensure that the letter was only read out by the plaintiff. He could not have intended by his act that the letter would be delivered to the plaintiff in his uncle's house and read out there to a number of persons. That is not the natural consequence of the act of the defendant and he could not have intended any such consequence. It is that criterion which is applicable in finding out whether the defendant in a case of defamation can be held liable for the publication which actually results, see for instance the case in *Huth* v. *Huth*[3]. The facts in that case were in fact stronger than those in the present case, because there the letter was addressed by Mr. Huth to Miss Edith Greaves, the maiden name of his wife, and was enclosed in an envelope which was not gummed and bore only a half penny stamp, less than the usual postage. The butler of the addressee felt curious that she should be addressed by her maiden name, took out the letter and read it. It was held that what the butler did was a breach of his duty, that he was not expected to take out the letter and read it and the defendant could not have anticipated that the letter would be so taken out and read by the butler and consequently there was no publication. The criterion is thus laid down by Swinfen Eady, L. J., at page 43:

> "When the authorities which were referred to are considered it will be seen that, in each of those cases, the defendant—who must be dealt with upon the footing that he intended the natural consequences of his act in the circumstances of the case intended the publication which in fact took place."

The same criterion is laid down by the other learned Judges. The subject is discussed in leading text-books, for instance in Clark and Lindsell on Torts, Chapter 20, section 7, para. 1267. Winfield on Tort the chapter on defamation Chapter 22, under section 4, the words must be published. Halsbury's Laws of England, Simonds Edition, Vol. 24, pages 33 to 43 Venkatesa Iyer's Law of Torts, Chapter 14, pages 335 to 338, Anand and Sastri, pages 561 to 567.

The appeal fails and is accordingly dismissed, but having regard to the fact that the matter was defamatory the parties will bear their costs throughout.

No leave.

R.M. *Appeal dismissed.*

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1. A.I R. 1931 Mad. 487.
2. A I R. 1934 All. 203 at 206.
3. L.R. (1915) 3 K B. 32.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE M. NATESAN.

The Trustees of the Port of Madras, represented by their Chairman .. *Appellant**

v.

M/s. Bombay Company (P) Ltd. Madras-1 .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), section 13—Remedies of employer against stranger—Injury to workmen—Compensation paid to workman—Injury to workman caused by tortious act of defendant's servants—Right of plaintiff to be indemnified by defendant—Suit against defendant claiming amount of compensation paid by plaintiff—Civil Court has jurisdiction—Workmen on receipt of compensation under the Act precluded from filing a suit against the tort-feasor—Right of employer to be indemnified by the tort-feasor—Different causes of action

The plaintiff had to pay compensation to its workmen under the Workmen's Compensation Act in respect of the injuries sustained by him and then filed the present suit against the defendant claiming the amount on the ground that it was the tortious act of the defendant's servants that resulted in the permanent disablement of the plaintiff's workmen On the question of the jurisdiction of the civil Court

Held The Civil Court has jurisdiction to entertain the suit filed by the plaintiff against the defendant claiming the compensation paid to the workman on the ground that the injury was the result of the tortious act of the defendant's servants

This right of indemnity is conferred on the plaintiff by the provisions of section 13 of the Workmen's Compensation Act The question whether this right is available even outside the provisions of section 13 of the Act was not finally decided

It may be that the workman having elected to claim compensation under the Act is precluded from filing a suit for damages in tort against the tort-feasor But that does not preclude the employer from pursuing his remedies against the tort-feasor having satisfied the workman's claim The causes of action in the two cases are entirely different

Appeals against the decree of the City Civil Court (Additional Judge), Madras in Appeal Suit No 178 of 1960 preferred against the decree of the Court of the City Civil Court (III Assistant Judge), Madras in Original Suit No 368 of 1957

V V Raghavan and *M Francies, P. Royan*, for Appellant.

K E Jacob, S K L Ratan and *J. Satyanarayana*, for Respondent in S.A No. 1005 of 1962 and for Appellant in S A 1550 of 1962.

The Court delivered the following

JUDGMENT—These Second Appeals arise out of a suit instituted by the Trustees of the Port Trust, Madras, for recovery of a sum of Rs 3,360 which they had to pay their workman one Danapal under the Workmen's Compensation Act of 1923. S A No 1005 of 1962 has been preferred by the plaintiff, the Port Trust, against the decree of the Additional Judge, City Civil Court, Madras, dismissing the suit on the ground that the civil Court had no jurisdiction in the matter. The Court of first instance held the other way and, finding on other issues also in favour of the plaintiff, decreed the suit as prayed for S.A No. 1550 of 1962 has been preferred by the defendant for costs disallowed on appeal

The case raises certain interesting questions and I shall first set out the relevant and material facts as they have emerged finally for consideration in the Second Appeal The injured workman Dhanapal formed part of the shore labour force at Madras Harbour of the Port Trust and, when on duty on the 11th of June, 1955, at South Quay I in the Harbour, he sustained injuries from a cart belonging to the defendant heavily loaded with iron mesh. As a result of the injury, the workman lost completely and permanently the use of both his legs and had to be declared unfit for further service The injured workman, by Exhibit A-14, applied to the Commissioner, Workmen's Compensation, for securing the compensation amounts. The Commissioner for Workmen's Compensation addressed the Port Trust by letter dated the 7th of January, 1956, regarding the steps taken to compensate the workman, and the Port Trust worked out the disablement compensation at Rs. 3,360 and

* S A Nos. 1005 & 1550 of 1962 10th March, 1966.

made the payment under the provisions of the Workmen's Compensation Act. The suit out of which the present Second Appeal arises was instituted on the averment that the disablement of the workmen was due to the negligence and carelessness of the defendant, and the Port Trust referring to section 13 of the Workmen's Compensation Act, hereinafter called the Act, claimed that under the provisions of the said section, the plaintiff had a right to be indemnified by the defendant. In defence it was *inter alia* contended that the accident was brought about by the workman himself by his own negligence, that the amount paid to the workman though within the limits set out by the Workmen's Compensation Act, was not reasonable, that the defendant is not liable under the Act, and that in any event the suit was not maintainable and was liable to be dismissed The principal issues of fact that arose for consideration at the trial were, whether the injury was the result of the negligence of the workman himself as pleaded for the defendant and whether the compensation claimed was reasonable There was also an issue of fact whether the permanent and total disablement was the result of the alleged accident The Court of first instance rejected the contention that the accident was caused by the negligent act of the workman himself and found that the accident had been caused by the negligence of the cartmen of the defendant who had given evidence on behalf of the defendant as D Ws 1 and 2 It was held that the defendant was clearly responsible for the consequences of the accident and that it had resulted in the permanent and total disablement of the workman The amount of compensation paid to the workman was found reasonable It was further held by the Court of first instance that, as an employer is liable whenever his servant committed tort in the course of his employment, the defendant was liable and answerable for the tort of his servants, the cartmen. The contention that a suit in the civil Court was not maintainable was overruled. On appeal, the learned City Civil Judge has confirmed the finding of the trial Court that the injury to the workman Dhanapal was caused by the negligence on the part of the defendant's servants and the quantum of compensation was not questioned. However, the learned Additional Judge, City Civil Court, accepted the contention on behalf of the defendant that by reason of section 19 of the Act, the civil Court had no jurisdiction to try the suit In that view, the suit was dismissed In the view that the defendant had failed in its contention on merits, the appellate Court directed the parties to bear their respective costs throughout.

The principal question that has arisen for consideration and argued at some length is the question of the jurisdiction of the civil Court to entertain the suit. Learned Counsel for the defendant, no doubt, addressed some arguments on the question whether the accident was caused by the negligence of the defendant's servants But this is a pure question of fact on which both the Courts below have concurred and I see no reason to differ from the finding that it is a tortious act of the defendant's servant's that resulted in the permanent disablement of the plaintiffs workman

The bar to the maintainability of a suit in the civil Court is rested on the provisions of section 19 of the Act which runs thus

> " (1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation, including any question as to whether a person injured is or is not a workman, or as to the amount or duration of compensation including any question as to the nature or extent of disablement, the question shall, in default of agreement, be settled by a Commissioner
>
> (2) No civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act "

The provision for indemnity on which the plaintiff has relied is section 13 of the Act which runs thus

> " Where a workman has recovered compensation in respect of any injury caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid to pay damages in respect thereof, the person by whom the compensation was paid and any person who has been called on to pay an indemnity under section 12 shall be entitled to be indemnified by the person so liable to pay damages as aforesaid "

While learned Counsel for the plaintiff would contend that the liability under section 13 is not a matter which the Commissioner has to settle, decide or deal with under the Act, learned Counsel for the defendant submits that the matter is in the exclusive competence of the Commissioner. Learned Counsel for the plaintiff would contend that section 13 merely declares an existing common law remedy and that even if section 13 had not been there, the plaintiff would be entitled to claim compensation or damages from the defendant for tort to its servants. Contra, it is argued for the defendant that apart from the right under section 13 the plaintiff could not get any compensation from the defendant and that any such claim would savour of an assignment of tortious liability or a mere claim in damages and would therefore be invalid, and also outside the Act any such claim could be maintained only on an assignment by the injured workman. It is submitted that such an assignment would be an assignment of a right of action in tort and so illegal and void. Section 13 of the Act, it is argued, provides by statute a right to subrogation and enables the employer to maintain action for recovery of the damages which he had paid to the workmen It is contended that the workman himself cannot, having accepted compensation under the Act, maintain a civil suit against the tort-feasor and so the plaintiff who under the provisions of section 13 gets subrogated to his position, also cannot maintain a civil suit against the tort-feasor

The main contention on behalf of the defendant is that the claim as laid and the plaint as framed, rest solely on the provision for indemnity found in section 13 of the Act. It is submitted that it would not be open to the plaintiff at this stage to travel outside the plaint and seek to fasten a liability on the defendant in tort. There is much to be said for this plea that the action is based only under section 13 of the Act. But on the facts of this case and the findings, this aspect of the matter may not be of much consequence. The defendant had an opportunity of contesting the amount claimed and the Court below has found that the amount paid as compensation to the workman is fair and reasonable However as the liability of the defendant to compensate the plaintiff outside the provisions of section 13, is otherwise also a more difficult problem for consideration, I have first addressed myself to the question whether a suit could be maintained in the civil Court for enforcing a claim to indemnity in terms of section 13 of the Act.

Certain principles in regard to the jurisdiction of a civil Court are well established. As observed by the Judicial Committee in *Secretary of State for India* v. *Mask and Co* [1] "it is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied " In *Kamala Mills* v *Bombay State*[2] speaking for the Supreme Court, Gajendragadkar, C J., observes at page 1952 :

> " Whenever it is urged before a civil Court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate In cases where the exclusion of the civil Court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not "

It is well established that where the right claimed is not purely a creature of a statute but is a common law right and the statute entrusting the special tribunal with certain disputes relating to the right does not expressly oust the jurisdiction of the civil Court wholly and the language of the statute does not in unmistakable terms make out that the right must only be exercised or enforced in a manner provided by the statute, the jurisdiction will not be barred. Also where the statute does not provide

1 L R 67 I A 222 (1939-40) F L J 15 : (1940) 2 M L J. 140 : I L R 1940 Mad. 599 (P C.)

2. A.I R. 1965 S C 1942

any special machinery for the determination of any particular right recognised or provided by the statute, recourse to the civil Court for the assertion and determination of the right should be and therefore would be available. It is a general principle of law that where there is a right, there must be a remedy *ubi jus ibi remedium*. Of course, where a right is created by statute and a special tribunal or forum is provided for its assertion and enforcement, the ordinary civil Court would have no jurisdiction to entertain disputes relating to the determination and enforcement of the right in question. When and in what circumstances there could be an inference of the ouster of jurisdiction of the civil Court is summarised by Willes, J., in *Wolverhampton New Water Works Co.* v. *Hawkesford*[1] thus as found in Maxwell on the Interpretation of Statutes, Eleventh Edition, page 123:

> " There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides no particular form of remedy . there, the party can only proceed by action at common law But there is a third class, *viz*, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class "

Whilst learned Counsel for the defendant would bring the present case under the third category, learned Counsel for the plaintiff seeks to place it under the first category, and failing would bring it under the second category. As in every case where the question of the exclusion of the civil Court's jurisdiction is pleaded, the matter has to be considered in the light of the words used in the statutory provision on which the exclusion is rested, I shall take up for consideration the provisions of the Act in question, and examine the Act with reference to its scheme, the particular provisions, their object and purpose. The Preamble to the Act recites that it is expedient to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident. The section which fixes the liability of the employer is section 3 and the relevant part of the section for the purpose of the present discussion runs as follows :

> " (1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this section .
>
> Provided that the employer shall not be so liable—
>
> (*a*) in respect of any injury which does not result in the total or partial disablement of the workman for a period not exceeding three days ,
>
> * * * * * * *
>
> (5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a civil Court a suit for damages in respect of the injury against the employer or any other person , and no suit for damages shall be maintainable by a workman in any Court of law in respect of any injury—
>
> (*a*) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or
>
> (*b*) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act "

It should be noticed that the workman has an option to either claim compensation under the Act or have recourse to the civil Court for damages in respect of the injury. If he had exercised his option and gone to the civil Court, he forfeits his right to compensation under the Act Similarly, he cannot maintain a suit for damages in a civil Court if he had instituted a claim for compensation before the Commissioner under the Act. The workman has the liberty to elect and avail himself of a remedy in tort for damages for negligence or wilful act against an employer or against some other person. The next important section is section 12 which runs thus :

> " (1) Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person for the execution by or

1. (1860) 7 C.A.N.S. 795 affd. in (1861) H.C.B.N.S. 456.

under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him, and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor, or any other person from whom the workman could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the workman could have recovered compensation, and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner

(3) Nothing in this section shall be construed as preventing a workman from recovering compensation from the contractor instead of the principal

* * * * * * *"

It will be seen that under the Act, a new liability is created and the employer even though he may not in the least be culpable is made liable to pay his contractor's workman where he employs a contractor for his trade or business The liability is fastened on the employer vicariously and by sub-clause (2) he is given an indemnity by the contractor. Obviously the object behind these provisions of the Act is to secure compensation to the workman who cannot fight out his battle for compensation, by a speedy process. One sees in the provision the view that a person who employs others to advance his own business and interest should be a more promising and certain source of recompense to the injured workman than the intermediary who may be a man of straw. May be, this principal liability of the employer may have an admonitory value in accident prevention, the principal employer being in a strategic position to reduce accidents by efficient organisation and supervision of his staff This section, it will be seen, provides only for indemnity by the intermediary between the employer and the actual workman The intermediary alsois a person who is engaged by the employer himself The workman may, under section 12, recover the compensation from the intermediary instead of the employer, referred to as the principal in the section The section provides not only for the immediate contractor working under the principal, but a contractor working under the immediate contractor Section 13, which has already been referred to, deals with a different situation The marginal heading, which, of course, cannot determine the interpretation to be given to the section or define the content of the section, refers to the section as "*Remedies of employer against stranger*". Section 13 by its very language excludes the liability determinable under section 12. Under section 13, the person by whom compensation was paid and any person who has been called on to pay an indemnity under section 12, shall be entitled to be indemnified by the person who, in the circumstances of the case, is under a legal liability to pay the damages in respect of the injury Section 13 provides for cases where the workman under an employer is injured by the tortious act of a stranger It may be that the workman is employed by a contractor or sub-contractor under the employer Then by virtue of section 12, the workman may claim compensation under the Act from the ultimate employer that is the principal employer The principal employer can claim indemnity for the compensation paid from his immediate contractor. The immediate contractor is given a right to claim indemnity from his sub-contractor. But there the liability for indemnity stops If there is a sub-contractor further down there is no provision for recourse against him even if he should be the tortfeasor. But the person who had finally been made to pay under section 12 could claim an indemnity if he could come under section 13 However section 13 does not in so many words provide for settlement of the compenation or indemnity amount in default of agreement between the parties. Only the right to indemnity is declared Section 12 (2) specifically provides for such settlement as between the principa land the contractors in respect of claims for indemnity amount in default of agreement between the parties Only the right to indemnity is declared. Section 12 (2) specifically provides for such settlement as between the principal and the contractors in

respect of claims for indemnity It looks as if the framers of the Act had in view only the claim of workmen, that is, those engaged or employed by the employer, for consideration by the authorities under the Act The contractor, the sub-contractor and the workmen at the end are all persons employed one under the other under the principal employer The Act itself as stated at the outset is intended to provide for payment by certain classes of employers to their workmen of compensation for injury by accident. The stranger is neither an employer nor a workman. As section 13 runs the right against him is only preserved as Counsel for defendant would have it declared.

Two rulings under section 12 read with section 13 may be referred to as they give a clear lead on the point now under discussion In *Sir Dhunjibhoy Bomanji* v. *Ganpa Khandu*[1] the plaintiff was a contractor for the coaling of the steamers of a steamship company He employed the defendants in the suit for supplying labour for shipping coal One of the labourers engaged by the defendants on the work of shipping coal was killed and the widow of the deceased workman claimed compensation against the steamship company under the Workmen's Compensation Act. The steamship company claimed indemnity for the said claim against the plaintiff and the plaintiff paid the amount and brought a civil suit under the provisions of section 13 of the Act against the defendants claiming to recover the said amount from them on the ground that as the deceased was in the employment of the defendants the plaintiff was entitled to recover the amount from the defendants by way of indemnity. Under the Act as it stood before 1933, there was no provision for claiming indemnity against a sub-contractor by the contractor working under the employer The provisions in the present Act for indemnity by the sub-contractor was inserted by Act XV of 1933 In those circumstances it was held in the aforesaid decision that section 12 (2) of the Act as it then stood contemplated only one principal and only one contractor and if therefore there was any sub-letting of the contract indemnity cannot be obtained under the Act and must be sought by recourse to the civil Court. The decision of a Division Bench of the Calcutta High Court on a reference by the Commissioner under the Workmen's Compensation Act in *Machuni Bibi* v *Jardine Menzies & Co.*[2] was relied on the learned Judge Wadia, J., observing

> "Taking the words of section 12 (2) and section 13 together, I agree with the construction put upon them by the High Court of Calcutta, and I hold therefore that this suit is maintainable"

The head-note in the Calcutta case may be set out

> "Where *A* undertakes work which is ordinarily part of his trade or business, but for his business he contracts with *B* for the execution of part of this work, and *B* similarly contracts with *C* for the execution of the whole or a part of the work he himself has contracted for and one of *C*'s workmen is killed by accident, the principal for the purpose of section 12 is *A* and he is entitled to be indemnified by *B*, and as regards the question whether *B* is entitled in turn to be indemnified by *C*, the Act does not provide for such a contingency The 'contractor' referred to in section 12 (2) is the contractor who contracts directly with the principal as defined in section 12 (1) If there is any further sub-letting of the contract indemnification cannot be obtained under the Act and must be sought by recourse to the civil Courts"

These two cases clearly recognise the civil Court's jurisdiction to entertain claims of indemnity which do not strictly fall within the scope of section 12. In the present case the indemnity claim can be rested under section 13 of the Act but there is no provision for its settlement or determination on dispute Falling outside section 12 but coming under section 13 on the principle of the above decisions the civil Court will be competent to entertain the claim. Learned Counsel for the defendant refers to section 22 which provides for the form of application and submits that these is nothing to preclude the submission of the dispute in relation to the indemnity claim before the Commissioner. I do not see anything in section 22 to warrant the invoking of the jurisdiction of the Commissioner for determination of the dispute between the employer and a third party. He is a tribunal of limited jurisdiction and neither analogy nor expediency could give him jurisdiction on a matter which is not specifically provided for. The Act does not purport to exclude the jurisdic-

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1 I L R 57 Bom 699

2. A I R 1928 Cal 399.

tion of civil Courts generally in all matters relating to compensation. At the very outset I have pointed out that even the workman has been given an option to initiate proceedings under the Act or to have recourse under the common law if he could maintain a claim in tort. Section 19 provides only for the settlement by the Commissioner of any question that may arise in any proceedings under the Act. Section 19 therefore applied only to proceedings initiated under the Act and the bar of the civil Court's jurisdiction is limited to matters which, under the Act are required to be disposed of by the Commissioner.

In this connection it is relevant to refer to rule 39 of the Rules framed under the Act where procedure is prescribed for the decision of the indemnity claims under section 12 (2) Where an indemnity is claimed against a person not a party to the case notice to that person is provided for and there is provision for the contest of the claim for indemnity by that person There is also provision for notice and hearing of the claim for indemnity by the third person called in by the principal employer against his sub-contractor. No procedure is prescribed under the Rules for determination of any indemnity that may be claimed under section 13. No provision is made for notice to a stranger against whom the indemnity could be claimed under section 13. There is one other indication in the Act itself that the jurisdiction of the civil Court is not ousted for the determination of any right claimed under section 13 : absence of any provision for an appeal on any determination under section 13. Section 30 of the Act provides for an appeal to the High Court *inter alia* against orders awarding compensation, orders relating to the distribution of compensation among the dependents of a deceased workman and against an order allowing or disallowing any claim on the amount of indemnity under the provisions of sub-section (2) of section 12. The absence of any provision for appeal on a determination under section 13 while providing for an appeal in regard to indemnity claims under section 12 is significant and clearly indicative of the fact that no determination by the Commissioner under section 13 is contemplated by the Act.

In my view even taking that the right of indemnity provided under section 13 does not exist outside the Act and is a rgiht specifically conferred by the Act, this will be a case where the statute, while giving a right, has not provided any particular form of remedy. The party affected can therefore have recourse to the ordinary civil Court and have his rights determined.

Some stress was laid by learned Counsel for the defendant on that part of clause (2) of section 19 whereby the civil Court's jurisdiction to enforce any liability incurred under the Act is taken away. Learned Counsel submitted that under section 13 there is a liability for indemnity cast on the stranger tort-feasor, and as the employer is seeking to enforce the same, sub-clause (2) bars the suit. But the language employed in the section is "to enforce any liability incurred under this Act". The section precludes the enforcement of a 'liability incurred' under the Act and not the enforcement of the liability itself Learned Counsel for the appellant contends that sufficient effect must be given to the word 'incurred' in relation to the liability found in the sub-section. It is pointed out that when it is a question of determination of a dispute, the same sub-section uses the words 'settle, decide, or deal with any question'. Further the question must be one which is by or under the Act required to be settled, decided or dealt with by the Commissioner It is in this context and background that the subsequent clause to enforce any 'liability incurred' under the Act should be interpreted. While considering the meaning of the word 'incurred' in Stroud's Judicial Dictionary it is stated "but the phrase 'have incurred expenses' means at least that the local authority has paid those expenses, or become liable to pay them as distinguished from estimated expenses". In the present context, the liability incurred can only refer to a liability determined after the Commissioner has settled, decided or dealt with a matter under the Act—not a matter yet to be determined One has to bear in mind another principle that when there is any doubt about the ousting of jurisdiction of any existing Court, the Court will lean to an interpretation which would maintain the existing jurisdiction.

I shall now take up for consideration the alternative contention of the learned Counsel for the appellant that even apart from the provisions of section 13, the plaintiff could, under the common law, seek reimbursement against the defendant for the compensation it had been by law compelled to pay the injured workman The argument is developed thus A master is liable for the tort committed by his servant in the course of the latter's employment Therefore, the defendant would be liable to the injured workman for the tort committed on him Of course, this proposition, as a question of law, is not controverted. Equally, it is recognised that a master can sue a person who injures his servant and thereby causes loss of service to the master. The cause of action for the master against the tort-feasor is the loss of service and the damages will have to be evaluated on that basis. Injury to the servant is a wrong which will give a right to the servant to proceed against the tort-feasor and it can also give a cause of action for damages to the master for loss of service. But the basis of assessment for damages in the two cases would be different In this case, as pointed out at the outset, the plaint is not laid on the basis of damages for loss of service

Learned Counsel for the plaintiff submits that he could rest his claim for restitution under section 69 of the Contract Act. Under section 69 of the Contract Act, a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. Learned Counsel submits that the word ' bound by law to pay ' under section 69 does not exclude those obligations of law which arose inter-parties whether by contract or tort. It is pointed out that they extend to any obligation which is an effective bond in law. But the liability which the plaintiff was called upon to meet and has met is one cast on him by statute. This amount which he has paid is not one in the payment of which he was merely interested. The statute cast an inescapable liability on him to make this payment. This payment, it cannot be said, is an amount which at the time of the payment the defendant was bound by law to pay It may be that the defendant may be made liable in tort He may be liable to the plaintiff or may be liable to the injured workman or he may not be liable at all The liability had yet to be determined and ascertained. As pointed out in *Nandlal Singh* v. *Ram Kirit Singh*[1], the use of the word ' reimbursed ' in section 69 is significant. Learned Counsel referred to the principle of implied indemnity set out in Chitty on Contracts, Twenty-second Edition, Volume II, in para. 1035 at page 455. The principle as regards implied indemnities is thus stated

" In many cases the law implies a promise to indemnify If the circumstances are such that the law imposes on any person a legal or equitable duty to indemnify, it will imply a promise on his part to do that which under the circumstances he ought to do "

Reference was also made to the observations of Vaughan Williams, L J , in *Bonner* v. *Tottenham and Edmonton Permanent Investment Buildings Society*[2] At page 173 of the report the following passage from Leake on Contract is set out.

" Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount "

But proceeding further the principle is thus elaborated in the judgment at page 174 :

" I am now dealing only with the principle upon which the common law liability is based There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and in interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or *pro tanto*, as in the case of a surety who has paid, and has his action for contribution against his co-surety The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued "

Neither of the principles abovesaid would apply to the present claim. The first principle *ex facie* has no application and for the application of the second one, there

1. A.I.R. 1950 Pat. 212.

2. L.R. (1899) 1 Q.B. 161.

must be a community of interest in the subject-matter to which the burden is attached and the present is not of that kind

It is possible to view the claim as one for cent per cent contribution or indemnity against the wrongdoer. The rules against contribution and indemnity are limited to manifestly illegal act or wilful wrong doing and to wrongful acts done by negligence As an example, where contribution had been ordered against a wrongdoer, Ramaswamy Iyer in his Law of Torts, Fifth Edition, at page 688, gives as illustration *Palmer* v *Wick and Pulteneytown Steam Shipping Company*[1]. There a stevedore who was engaged in discharging pig-iron from the plaintiff's ship, caused the death of a workman by his negligence It was found that the accident was due also to the negligence of the plaintiffs in not providing safe tackle The representatives of the deceased workman got a decree for damages against both the stevedore and the plaintiffs The stevedore was held liable to contribute a half of the damages to the plaintiffs who paid the whole

In Salmond on Law of Torts, Eleventh Edition, at page 92, the following rule is found

"It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other Thus a master who has paid for the negligence of his servant should be able to sue that servant for indemnity That this is generally so cannot be doubted, provided that the negligence of the employer himself or one of his other servants has not contributed to the damage "

In *Semtex Ltd.* v *Gladstone*[2], wherein this passage has been quoted as a true principle, Finnermore, J., observes at page 949 .

"For some reason that I have never been quite able to understand, the master who is vicariously responsible for his servant is referred to as, and apparently treated as, a joint tort-feasor This point was elaborated by Denning, L J , in *Jones* v *Manchester Corporation*[3] I could never see why an employer, whose only liability is the vicarious liability of being responsible for what his servant does, should be called a joint tort-feasor, which should mean a person who took some part in the tort which is the subject of the action "

In a case of the present kind, the plaintiff who was compelled by statute to pay for the tort committed by another on the servant, cannot be held to be tort-feasor in any sense of the word And there can be no question of his claim to indemnity being hit at or vitiated by any principle of public policy. There is one case, *Muthuswami Reddiar* v *Sirkar*[4], wherein it has been held that apart from the Workmen's Compensation Act, a plaintiff, as in the present case, could claim indemnity under the general law. At page 175 of the report is found the following observation ·

"Section 3, Workmen's Compensation Act, imposes a liability on the employer to pay compensation to the workman who sustains personal injury by an accident during the course of his employment Hence the payment made by the plaintiff to the driver of the bus who had sustained injury as a result of the collision between the lorry and the bus cannot be said to have been a voluntary payment On the other hand, it was a payment in discharge of a statutory obligation under section 15 of the Act, the party paying a compensation is entitled to be indemnified by the person who has been responsible for the injuries sustained by the workman Thus the plaint claim for Rs 406-12-9 is clearly sustainable as against defendant 1 Even apart from the provisions of the Workmen's Compensation Act, the general law also enables the plaintiff to claim this amount from defendant 1 It is a principle of common law that a master can maintain an action for the loss of service of his servant by the tortious act of another person "

While hesitant to give a definitive opinion, on the authorities now placed before me, I am inclined to hold that even outside section 13, the plaintiff in a case like the present could claim reimbursement against the tort-feasor of the amount he had been compelled to pay under the Act By the payment the tort-feasor is relieved of his liability to the injured workman, and the reimbursement claimed is only of a pecuniary demand the employer had to meet as a consequence of the tort, besides suffering loss of service Of course the employer will have to establish against the third party the tort which resulted in the injury and the connection and reasonableness of his claim as in any action in tort. But it is unnecessary to carry this

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1 L.R. (1894) A C 318
2 (1954) 1 W L R 945
3 L R (1952) 2 Q B 852.
4. A I.R. 1951 T.C. 171.

discussion further, as the plaintiff's right of suit could clearly be rested on the ground that neither expressly nor by implication the right of suit for a claim under section 13 of the Act has been taken away

It is submitted for the defendant that the plaintiff's claim is really one of subrogation and that as the plaintiff cannot have any higher rights than the workmant he is barred as the workman will now be barred from instituting a suit against the defendant for damages in tort. I am unable to appreciate the scope of this argument Learned Counsel for the defendant would equate the plaintiff to the position of an insurer It may be that the workman having elected to claim compensation under the Act is precluded from filing a suit for damages in tort against the tort-feasor. But that does not preclude the employer from pursuing his remedies against the tort-feasor having satisfied the workman's claim The causes of action in the two cases are entirely different

In the result S.A. No. 1005 of 1962 succeeds The decree and judgment of the lower appellate Court are set aside and those of the trial Court are restored. In the circumstances, S A. No 1550 of 1962 has to fail and is, therefore, dismissed, without costs S A. No. 1005 of 1962 is allowed but parties will bear their respective costs throughout.

V.S. — *S A. No* 1005 of 1962 *allowed,* *S.A No* 1550 of 1962 *dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR M ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE K. S RAMAMURTHI.

Pratapchand and others . *Appellants**

v.

Lakshman Prasad Gupta *Respondent.*

Civil Procedure Code (V of 1908), *section* 48—*Limitation under—If could be extended by sections* 14 *and* 15 *of the Limitation Act (IX of* 1908)

Limitation Act (IX of 1908), *sections* 14 *and* 15 *and Civil Procedure Code (V of* 1908), *section* 48—*Applicability of—Execution—Exclusion of time during which execution was stayed by order of Court—If would apply to the limitation prescribed under section* 48 *of the Civil Procedure Code—" Prescribed "—Scope of*

Section 48 of the Civil Procedure Code is controlled by section 15 of the Limitation Act and the expression 'prescribed' in section 15 (1) of the Limitation Act is not restricted to the periods of limitation prescribed under Schedule I of the said Act and it would include also cases where a period of limitation is prescribed by any general statute like the Civil Procedure Code Hence the period of 12 years mentioned in section 48 of the Civil Procedure Code is 'a period of limitation prescribed' within the meaning of section 15 of the Limitation Act

The same reasoning will apply to section 14 of the Limitation Act as well The word 'prescribed' in section 14 of the Act will also include cases of limitation prescribed by general statutes and is not confined only to those under Schedule I of the Limitation Act

A decree-holder, who has been prosecuting execution proceedings, which were stayed by order of Court and which became infructuous subsequently is entitled to exclude the time taken by such proceedings both under sections 14 and 15 of the Limitation Act in computing the period of 12 years under section 48 of the Civil Procedure Code

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr Justice T Venkatadri, dated 17th July 1961 in the Ordinary Original Civil Jurisdiction of this Court in Application No 1109 of 1960 in E P No 323 of 1956 in Money Suit No 76 of 1937 (on the file of the Court of the 1st Subordinate Judge at Arrah).

K Thiruvenkatachari, for Appellants

A. R. Krishnaswami, for Respondent.

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* O S.A No 11 of 1962 21st March, 1966.

The Judgment of the Court was delivered by

Ramamurthi, J—This case illustrates the proverbial thorny path of execution which the decree-holder has to pursue before he is able to realise the decree The decree in this case was passed by the Sub-Court of Arrah in July 1938, and from 1941 onwards the judgment-debtors have been successfully obstructing the realisation of the decree. It is interesting to mention that in this Court in the objection filed in the execution application (*vide* counter-affidavit of Baijinath Prasad) it is stated the properties sought to be attached within the jurisdiction of this Court are worth more than a lakh of rupees, and the only objection raised is a plea of limitation A brief reference to the prior history of the proceedings taken in execution of this decree is necessary for a proper appreciation of the plea of limitation raised.

On 20th July, 1938 a money decree was passed by the Sub-Court, Arrah, for a sum of Rs. 18,540. This decree was transferred to the Civil Judge, Allahabad for execution and in that Court in E.P. No. 38 of 1941 there was an order for attachment of a sugar mill of the judgment-debtors As a result of the order passed by the High Court at Allahabad the execution proceedings were stayed and were revived on 13th May, 1950. On 11th July, 1952, the sugar mill was attached and it was sold in public section on 19th February, 1955. On objection raised by the judgment-debtors under section 4 of the U.P. Encumbered Estates Act the sale of the sugar mill was set aside on 31st May, 1955. On 17th March, 1956 an application was made for the transfer of the decree to the Madras High Court for execution as the judgment-debtors possessed some immoveable properties (buildings) in Madras, and the decree was transmitted to this Court for execution on 6th June, 1956. On 13th August, 1956 the present execution petition, E.P. No. 323 of 1956 was filed in this Court.

In the affidavit filed in support of the execution petition in para 5, there is a brief reference to the abovesaid facts, and it was claimed that the period during which the execution of the decree was prevented by reason of the stay order should be excluded under section 15 of the Limitation Act in computing the period of limitation prescribed under section 48 Civil Procedure Code as the period of 12 years prescribed thereunder expired by 1950 It is necessary to mention at this stage at the outset that in the counter affidavit filed on behalf of the several respondents the only objection that was raised was that section 15 of the Limitation Act would not apply and no particulars were given as to why section 15 would be inapplicable to the case.

The learned Master dismissed the application for execution as barred by limitation. But on appeal T Venkatadri, J., reversed that order and directed execution to proceed in the view that the decree-holder will be entitled to the exclusion of time both under section 14 and section 15 of the Limitation Act Even though particular reliance was not placed upon section 14 before the learned Master, this aspect of the matter was argued before the learned Judge and he upheld the same in the view that all the facts necessary to invoke section 14 are beyond controversy, and that the facts found were sufficient to attract the applicability of section 14.

Exhibits P-2, P-3 and P-3 (*a*) are the records of the proceedings on the file of the Civil Judge of Allahabad and a perusal of the same would show that further proceedings by way of execution in E.P. No 31 of 1948 were stayed as a result of the stay order passed by the High Court, and that it was only in 1950 that the execution proceedings could be revived after the stay was vacated. Exhibit B-3 shows there was an order of injunction passed by the High Court restraining the execution of the decree T Venkatadri, J., followed and applied the decision of a Full Bench of this Court in *Kandaswami* v. *Kannappa*[1], in which it was held that section 48 of the Code of Civil Procedure is controlled by section 15 of the Indian Limitation Act, and that the expression 'prescribed' in section 15 (1) of the Limitation Act is not restricted to prescribed by the Schedule I to the Act and that it would include

1 (1951) 2 M L J 668 I L R (1952) Mad 421 (F B.).

also a case where a period of limitation was prescribed by any general statute like the Code of Civil Procedure, and that the period of 12 years mentioned in section 48 of the Code of Civil Procedure is 'period of limitation prescribed' within the meaning of section 15.

In view of this Full Bench decision of this Court the only argument that was attempted by learned Counsel for the appellants was that the decree-holder has not placed all the materials to enable him to obtain the benefit of exclusion under section 15 and that Exhibits P-2 and P-3 and P-3 (*a*) are not sufficient for the purpose. He urged that the decree-holder must furnish further particulars about the precise nature of the stay order, the property to which it related and the period during which the order of stay was in operation We are unable to accede to this contention. It must be remembered that the decree is an old decree of the year 1938, and many of the records would not be available We agree with T Venkatadri, J., that Exhibits P-2, P-3 and P-3 (*a*) contain sufficient particulars to show that there was an order of stay and also an injunction restraining the execution of the decree for the sale of the sugar mills There is no evidence that the judgment-debtors were possessed of some other properties in Allahabad In this connection it becomes relevant to notice that in the counter-affidavit filed by the respondents it was not stated that section 15 would not apply because the judgment-debtors had other properties within the jurisdiction of that Court We are satisfied that the materials furnished by the decree-holder in the instant case are sufficient and entitled them to the benefit of section 15

Regarding the point based upon section 14 of the Limitation Act, the only argument that was advanced by learned Counsel for the appellants was that the Full Bench in *Kandaswami* v. *Kannappa*[1], dealt with only a case under section 15 and that it would not apply to section 14. We see no substance whatsoever in this contention, and we have no hesitation in holding that every portion of the reasoning in the Full Bench case would apply to section 14 as well It must be noted that the point that was referred for consideration by this Full Bench was the proper interpretation of the expression " prescribed " in section 15 of the Limitation Act, whether it meant ' prescribed in the Schedule to the Limitation Act' or ' prescribed in any other enactment ' It is sufficient to refer to the following observations of Rajamannar, C.J , at page 442.

" On a careful consideration of the decided cases on the point and the course of legislation, I have arrived at the following conclusions The expression 'prescribed' in section 15 (1) of the Limitation Act does not mean ' prescribed by the First Schedule ' to the Act It would include a case where a period of limitation is prescribed by any general statute like the Civil Procedure Code I venture to think further that even if it be understood in the strictest sense, the period fixed by section 48 of the Civil Procedure Code, must be deemed to have become a part of the Limitation Act by a process of incorporation in Articles 181 and 182 Column (1) of Article 181 speaks of an application for which no period of limitation is provided elsewhere in this schedule or in section 48 of the Civil Procedure Code, 1908 Whether the word ' prescribed ' in section 15 (1) would apply to periods of limitation provided by other statutes or not, it is clearly indicated by Article 181 that the period fixed by section 48 is *in pari materia* with the periods of limitation provided in the schedule to the Limitation Act Column (1) of Article 182 further supports this view The period of twelve years mentioned in section 48 of the Code is a period of limitation The term ' period of limitation ' means the time prescribed by law at the end of which a right ceases to be enforceable in a Court, whether by a suit or application "

Reference may also be made to the following observations at page 437 with reference to the context in which the learned Chief Justice referred to the decision of the Privy Council in *Phoolbas Koonwur* v. *Lalla Jojeshwar Sahoy*[2].

" The importance of this decision of the Privy Council appears to me to be this, that the rules laid down in the Limitation Act relating to the computation of the periods of limitation need not necessarily be confined to periods prescribed in that Act and in proper cases, due regard being of course had to the language, can be applied to periods of limitation prescribed by other statutes of a general nature like the Civil Procedure Code "

The same expression ' prescribed ' is used in section 14 and we cannot conceive of any reason as to why the same principle should not apply to section 14 If

1 (1951) 2 M L J 668 I L R (1952) Mad 421 (442, 437) (F B.).

2 L R 3 I A 7 · (1876) I L R 1 Cal 226 (P C)

we may say so, the point is simply unarguable in the face of the Full Bench decision which is binding upon us

No argument was advanced touching the *bona fides* or the good faith with which the earlier proceedings in execution were prosecuted or the inapplicability of section 14 for any other reason We agree with T. Venkatadri, J, that the decree-holder is entitled to exclusion of the period spent in prosecuting the prior infructuous execution proceedings both under section 14 and under section 15.

The result is, the appeal is dismissed with costs and the matter will be further enquired into by the Master as remanded by T. Venkatadri, J. Having regard to the stakes involved and points raised and argued I fix Counsel's fee at Rs. 1,000 both senior and junior.

R M — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE P. S KAILASAM.

K. S. Venkataraman & Co. (P.), Ltd. . *Petitioner**

v.

State of Madras .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *section* 70—*Refund of Court-fee under —When could be done*

Section 70 of the Madras Court-fees Act provides for refund of Court-fee paid by mistake or in inadvertance When a party filed a writ petition deliberately with the intention to obtain the relief sought for, but later decides not to pursue the same, to such a case section 70 of the Act will not be applicable Different considerations may apply if the provisions of the Court-fees Act are not applicable as in cases of Court-fees paid under the Sales Tax Act When the Court-fees Act specifically provides under what circumstances a refund can be ordered, it is not justifiable for the Court to exercise its inherent powers and direct refund in cases not covered by the Act

Petitions under section 70 of the Court-fees Act and section 151, Civil Procedure Code praying that in the circumstances stated therein and in the affidavit filed with C M P No 506 of 1966 on the file of the High Court, the High Court will be pleased to issue a certificate for refund of Court-fee paid in S. No Nos. 35340 etc

T. T. Srinivasan and *A. N Rangaswami*, for Petitioner.

The Court made the following

ORDER.—These petitions are filed praying for the refund of Court-fee paid by the petitioner in the Writ Petitions filed before this Court These petitions were filed for the issue of Writs in the nature of *mandamus* and *certiorari* for quashing certain sales tax assessments made against it Before these petitions were numbered, they were returned for rectifying certain defects. Before these defects were rectified, an appeal by the petitioner to the Supreme Court regarding the same matter was allowed Therefore, the petitioner felt that it was not necessary to prosecute these Writ Petitions In the circumstances the petitioner has prayed for refund of the Court-fee paid by it in these Writ Petitions.

The provision relating to refund of the Court-fee is section 70 of the Madras Court-fees and Suits Valuation Act, 1955 Under the section, when the fee is paid by mistake or inadvertance, it shall be ordered to be refunded The fee was certainly not paid by any mistake or inadvertance It was deliberately paid for obtaining the relief in the Writ Petitions But as an appeal was decided in its favour, the petitioner did not want to pursue the Writ Petitions In the circumstances, section 70 will not be applicable

In *Zahoorunnissa Begum* v. *Mohammed Ali*[1], the circumstances under which refund of Court-fee could be ordered are set out In *Balakrishna Chetty* v. *State of Madras*[2], a Bench of this Court held that the Court-fee of Rs 100 paid under the

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*C M P. Nos 1506 to 1515 of 1966 — 22nd March, 1966.

1. (1962) 1 M L J 331
2. (1962) 2 M L.J 186 13 S T.C 398.

provisions of the Madras General Sales Tax Act should be refunded when the revision petition was sought to be withdrawn before it took effect by being taken on file and numbered The Bench held that as the provisions of the Court-fees Act are obviously not applicable and as there is no provision in the Sales Tax Act relating to refund of Court-fee, the Court can exercise its inherent jurisdiction and direct a refund of the fee where the petition was sought to be withdrawn before it took effect by being taken on file and numbered.

There is no dispute that the Court-fee payable in the Writ Petitions is governed by the Madras Court-fees and Suits Valuation Act, 1955 and, therefore, section 70 of the Act is applicable. The decision in *Balakrishna Chetty* v. *State of Madras*[1], is not applicable as the Court-fee was paid under the General Sales Tax Act where there are not provisions relating to refund of fee The fee paid cannot be refunded under the Court-fees Act. When the Act specifically provides under what circumstances a refund can be ordered, it is not justifiable for the Court to exercise its inherent powers and direct refund in cases not covered by the Act

These petitions are dismissed.

R.M *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K VEERASWAMI AND MR JUSTICE M. NATESAN.

The Indian Mutual General Insurance Society, Ltd., Madras .. *Appellant**

v.

R. Raman Nair .. *Respondent.*

Insurance—Motor Accident Insurance—Policy containing indemnity clause against loss or damage to the vehicle 'by accidental external means'—Exception regarding earthquake or other conculsion of nature—Scope of

Where a lorry parked at a particular spot rolled down and got damaged due to the sudden sinking of loose soil, it is certainly an 'accident' as nobody foresaw it The accident was also due to 'external means' which means in the context causes not referable to what is internal to the lorry, e g , a sudden bursting of the engine Loosing of earth under the wheel cannot be described as a convulsion of nature and the exception clause cannot be invoked to avoid liability on the part of the Insurance Company

Appeal against the decree of the City Civil Court (VII Asst. Judge), Madras in Original Suit No 399 of 1960

V. P. Raman and *R Krishnaswami*, for Appellant.

T K Subrahmania Pillai, for Respondent

The Judgment of the Court was delivered by

Veeraswami, J—The respondent's lorry M D N. 3797 was covered by a comprehensive insurance policy issued by the appellant, the period of cover being from 23rd October, 1958 to 22nd October, 1959 On 5th February, 1959, while the lorry was parked on a road in Appukodu in Nilgiris, it tumbled down the valley up to a distance of 50 yards from the parking place and was thereby badly damaged. This was on account of the fact that there was a sudden sinking of the loose soil at the place near the right rear wheel of the lorry and the road was on a gradient. Though the downward movement of the lorry was prevented by placing wooden logs, the accident took place due to the sinking of the loose soil The respondent made a claim which the appellant repudiated with the result the former had the lorry repaired elsewhere at a cost of Rs. 5,466-45. The appellant's repudiation was on the ground that the accident was not due to external means and that in any case it was covered by one of the exceptions contained in the terms and conditions of the insurance policy. The respondent's claim was decreed by the Seventh Assistant Judge.

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1 (1962) 2 M L J. 186 . 13 S.T C. 398

*Appeal No. 529 of 1961. 12th April, 1966.

There is no dispute about the facts as we narrated. The only question is whether the risk is covered by the terms of the policy. The material term in the policy is that the appellant will indemnify the insured against the loss of or damage to the motor vehicle " by accidental external means." The rest of the terms is not material The policy provides for certain general exceptions of which one is relied on for the appellant, that is, that the appellant will not be liable in respect of any accident loss or damage due to " earthquake or other convulsion of nature." Learned Counsel for the appellant argues that the accident to the lorry can by no means be described as an accident by external means. He adds that in any case, the accident must fall within the expression " other convulsion of nature." In our opinion, this contention cannot prevail. The words " by accidental external means,' in our view, are comprehensive to include the accident to the lorry. The occurrence was certainly accidental for, nobody foresaw it. It just happened that the lorry was parked at the spot and it was an accident that it rolled down the hill. The accident was also due to the reason as we said that the loose soil underneath the right wheel gave way. We do not see why this cannot be described as " by external means." External in the context is to be understood as referable to cause other than what is internal to the lorry, as for instance, a sudden bursting of the engine. The other phraseology " earthquake or other convulsion of nature " is also definite of its meaning. Other convulsion of nature must be of the pattern of the earthquake or something like it. Even if the words " other convulsion of nature" are read disjunctively from the word " earthquake," even so, the loosening of the earth can hardly be described as a convulsion of nature.

We are, therefore, of opinion that the Court below was right in decreeing the suit. The appeal is dismissed with costs.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE R. SADASIVAM

Philipp Ullrich .. *Petitioner**

v.

Chellan Sanyasi .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 94 and 516-A —Property alleged to be concerned in a case of theft left in the custody of accused by Court on executing a security bond—Bond getting cancelled by failure to file a charge-sheet within the stipulated time—Court if could call upon the accused to produce the property left in his custody.

Certain properties seized by the Police as being concerned in a case under section 409, Penal Code, were directed to be handed over to the accused on his executing a bond which stipulated that the bond would stand cancelled if the charge-sheet was not filed within a specified date

Held Though the bond got cancelled by reason of the time fixed under it, the Court can still order, in a case filed against him subsequently, the accused to produce those properties if they still remained with him The right of the accused to deal with the property as he liked was restrained up to the particular date mentioned in the security bond But if the properties continue to remain with the accused there is nothing which can stand in the way of the Court ordering him to produce those properties and if he fails to do so the Court can issue a general search warrant to the concerned police officer to search and produce the articles

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Additional First-Class Magistrate, Padmanabhapuram, dated 9th October, 1965 and made in C.C. No. 233 of 1965 (Tiruvattar Station Crime No 95 of 1964).

S. Gopalaratnam and *P. N. Venugopalan,* for Petitioner.

V. Meenakshisundaram, for Respondent.

K. A. Panchapagesan for Public Prosecutor, for State.

*Crl.R C. No. 1293 of 1965. 19th April, 1966.
(Crl. R P. No. 1270 of 1965).

The Court made the following

ORDER.—Petition by the complainant Phillip Ullrich to revise the order of the Additional First Class Magistrate, Padmanabhapuram, refusing to direct the accused to produce the properties concerned in the case which were entrusted to him in pursuance of the order of this Court in Criminal Revision Case No. 1529 of 1964 dated 2nd November, 1964 In fact it was the Circle Inspector who moved the Additional First Class Magistrate for such a direction and it was refused by the Magistrate not only on a construction of the order of this Court but also on the ground that it amounted to testimonial compulsion.

The facts which led up to that order are briefly as follows The petitioner preferred a complaint to the police under section 409, Indian Penal Code and the police seized the properties forming the subject-matter of this petition from the possession of the accused. The accused filed an application under section 516-A, Criminal Procedure Code, for custody of the properties stating that they belonged to him and that he did not commit any offence in respect of the same The learned Additional First Class Magistrate ordered the return of the properties to the accused on condition of his executing a bond and depositing a sum of Rs 8,000 The accused came up in revision to this Court and this Court in Criminal Revision Case No 1529 of 1964 modified the order by permitting the accused to execute a bond for Rs 8,000 with one surety instead of furnishing cash security and further directed that the bond would stand cancelled if no charge-sheet was filed by the police before 2nd January, 1965. Unfortunately for some reason or other, which is not clear, the police did not file a charge-sheet before 2nd January, 1965 with the result that the bond stood cancelled The police ultimately filed a charge-sheet against the accused under section 409, Indian Penal Code, only on 28th March, 1965

The learned Advocate for the petitioner relied on the decision in *Ram Prasad* v. *State*[1], where it was held that even a forfeiture of the bond executed by a person to obtain custody of property under section 516-A, Criminal Procedure Code, would not deprive the Court of its power to order the production of the property. But in this case, the bond was not forfeited, but got cancelled by reason of the fact that the police failed to file a charge-sheet by 2nd January, 1965. The effect of the bond getting cancelled is as though the properties were returned to the accused without a bond. It should be noted that section 516-A, Criminal Procedure Code, under which alone the accused got possession of the properties, deals with custody and disposal of property pending trial in criminal cases. In fact even the Criminal Revision Case No 1529 of 1964 on the file of this Court arose out of a petition filed by the accused under section 516-A, Criminal Procedure Code and the petition shows that the accused prayed for appropriate orders directing delivery of the articles to him so that they might remain in proper custody pending the conclusion of the trial of the case Hence the order of this Court in Criminal Revision Case No. 1529 of 1964 cannot take away the jurisdiction of the criminal Court to order the accused to produce the properties concerned in the case It should be noted that the properties were seized by the police as being concerned in the case and it is by virtue of the order of this Courtth at they were returned to the accused under section 516-A, Criminal Procedure Code It is true time limit upto 2nd January, 1965 was fixed for the police to file a charge-sheet and the right of the accused to deal with the properties as he liked, if really they belonged to him as contended by him, was restrained upto 2nd January, 1965 If the properties continue to remain with the accused, there is nothing which can stand in the way of the Court ordering him to produce those properties. The learned Advocate for the accused was not in a position to state whether the properties are still with the accused or not It is true a summons cannot be issued to the accused to produce the properties The Supreme Court has held in *State of Gujarat* v. *Shyamlal*[2], that though the language of section 94 Criminal Procedure Code, is general and *prima facie* apt to include an accused person, there are indications that the Legislature did not intend to include an accused person.

1 A I R 1955 Cal 586 417 · A I R. 1965 S.C 1251.
2. (1965) 2 S C J 18 1965 M L J (Crl.)

The Supreme Court has further observed that it might be that this construction of section 94, Criminal Procedure Code, would render section 96, Criminal Procedure Code, useless for no search warrant could be issued to search for documents known to be in the possession of the accused but that a general search or inspection by the concerned police officials could still be ordered

Having regard to the above principles, the proper thing that the learned Additional First Class Magistrate should have done is to call upon the accused to produce the articles entrusted to him by virtue of the order under section 516-A, Criminal Procedure Code and if he fails to do so to issue a general search warrant to the concerned police officer to search and produce the articles

The order of the lower Court is revised accordingly and the Additional First Class Magistrate is directed to follow the procedure indicated above.

R.M. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR. JUSTICE T. VENKATADRI

Manicka Gounder .. *Appellant**

v.

Samikannu Gounder *Respondent*

Specific performance—Suit for specific performance of agreement to reconvey immovable property—Consent decree providing for reconveyance on deposit of money by plaintiff within a specified time—No default clause—Plaintiff not depositing money within time—Claim for extension of time—If can be granted

A suit instituted by the plaintiff for specific performance of an agreement executed by the defendant to reconvey certain immovable property which originally belonged to the plaintiff was compromised and a consent decree was passed in and by which it was provided that the plaintiff should deposit a sum of Rs 800 on or before 15th November, 1962 and also the necessary general stamp papers into Court and that the defendant should reconvey the property on such deposit being made There was, however, no provision as to the effect of non-payment of money The plaintiff did not deposit the amount within time but filed an execution petition on 26th November, 1962, after depositing the sum of Rs 800, praying that the defendant might be directed to execute a sale deed as per the consent decree He also filed a petition for extension of time till the date of deposit made by him The Courts below granted extension of time and directed the defendant to execute a sale deed as prayed for On appeal,

Held Having regard to the fact that there was no clause in the consent decree as to the effect of non-payment of money and other circumstances of the case, the Courts below were right in deciding that time should be extended to enable the plaintiff to deposit the money as per the terms of the consent decree

However, taking all the circumstances of the case and in the interests of justice the respondent should be directed to deposit another sum of Rs 200 in addition to Rs 800 already deposited before enforcing the decree

Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated 30th December, 1963 and made in C M A No 70 of 1963 (E P No. 605 of 1962 in O S. No 297 of 1961, District Munsif's' Court, Tindivanam)

K. N. Balasubramaniam, for Appellant

K. V. Venkataseshadri, for Respondent.

The Court made the following

ORDER —This appeal arises out of execution proceedings in O S. No. 297 of 1961, a suit instituted by the respondent for specific performance of an agreement to reconvey the suit property dated 13th June, 1959 executed by the appellant to the respondent. The suit itself was compromised and a consent decree was passed in and by which the respondent (plaintiff) should deposit a sum of Rs. 800 on or before 15th November, 1962 and also deposit the necessary general stamp papers into Court for the appellant to reconvey the property to the respondent on such deposit of the said amount by the respondent. The respondent did not deposit the amount as mentioned in the said decree on or before 15th November, 1962 But

*A A A O No 84 of 1964. 3rd December, 1965.

filed E P. No 605 of 1962 on 26th November, 1962 after depositing the sum of Rs 800 and praying the Court that the appellant might be directed to execute a sale deed in favour of the respondent as per the terms of the compromise decree By abundant caution, the respondent filed M.P. No 935 of 1962 in O S No 297 of 1961 for extension of time for the payment of the said sum of Rs 800 as per the terms of the consent decree He set up a plea that on or before 15th November, 1962 he tendered the money to the judgment-debtor (appellant here) and that as he refused to receive the same, he did not deposit and therefore he had come to Court to execute his decree after depositing the said sum of Rs. 800 and praying the Court to extend time for payment from 15th November, 1962 till the date of deposit made by him in the Court The Courts below disbelieved the story of the respondent but they came to the conclusion that time was not the essence of the contract in respect of the immovable properties, granted the extension of time and directed the appellant here to execute a sale deed in respect of the suit property in favour of the respondent. It is against the order of the Subordinate Judge of Cuddalore in appeal that the judgment-debtor has preferred this Civil Miscellaneous second Appeal

In this appeal, it is seriously contended by learned Counsel for the appellant that time is the essence of the contract in the case of reconveying the suit property. In this connection he has drawn my attention to the decision of the Federal Court in *Shanmugham Pillai* v. *Annalakshmi Ammal*[1] It has been laid down at page 546

" It is well settled that when a person stipulates for a right in the nature of a concession or privilege on fulfilment of certain conditions, with a proviso that in case of default the stipulation should be void, the right cannot be enforced if the conditions are not fulfilled according to the terms of the contract Such conditions, though relating only to payment of money, are not regarded as a penalty and Courts of Equity will not afford relief against a forfeiture for their breach "

This principle has been consistently followed later by the Supreme Court in *Srimrathmull* v *Nanjalingiah*[2], and this Court in *Balasundara* v *Muthuvenkatachala*[3] There seems to be some force in the contention urged by learned Counsel for the appellant. But we have to consider whether the extension of time can be granted in the circumstances of the instant case It is common ground that this is a suit for specific performance of the agreement to reconvey the suit property which originally belonged to the respondent here There is also the compromise decree in and by which certain time was fixed for depositing the sum of Rs 800 Unfortunately as noted by the Courts below, there is no default clause In such a case, the Court should take into consideration that the suit should be deemed to be pending but not finally disposed of In *Badul Shaker Sahib* v *Abdul Rahiman Sahib*[4], the facts are similar. In that case a decree for specific performance of a contract for sale provided (*a*) that, upon payment by the plaintiffs of a sum named within two months from the date of the decree, the 1st defendant do execute and register a proper deed of conveyance of the properties in the schedule and (*b*) that upon payment the 1st defendant do put the plaintiffs in possession of the said properties together with all title deeds In such a case, Sir Walter Schwabe, C J., for the Bench observed at page 113:

" Lastly it was contended, and this is a more difficult point, that as two years had elapsed from the date of the original offer of the money, the plaintiffs were too late in bringing this suit It is a well-established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the Court ought not to exercise its powers In this case on the facts I think that the delay should be excused, for on the evidence, the plaintiffs were put off for some time by the first defendant himself The case has however been brought very late but in my judgment not late enough to compel us to refuse relief at not being shown that the defendant has been prejudiced "

Veeraswami, J in similar circumstances in *Palanichami Nadar* v. *Gomathinayagam*[5], has held (head-note) ·

" Even though the finding of the Court is to be accepted that the default was on the part of the purchaser as he was not ready with the funds to complete the sale on 30th April, 1959, this is a case in which time was not of the essence of the contract and therefore the plaintiff will be entitled to a decree

1 (1950) S C J 1 (1950) 1 M L J 683 926 A I R 1954 Mad 799
(1949) 50 F C R 537
2 A I R 1963 S C 1182
3 (1952) 2 M L J. 141 I L R 1954 Mad
4 (1922) 44 M L J 107
5 (1965) 78 L W 186

for specific performance Equity will look not at the letter but the substance of the transaction in ascertaining the intention of the parties to the agreement, and notwithstanding an express stipulation, for execution of the sale within specified time, it would in substance regard the intention of the parties as that the agreement should be performed within reasonable time *Prima facie* equity treats the importance of such time limits as being subordinate to the main purpose of the parties and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law, the contract has not been literally performed by the plaintiff as regards the time limit specified But, equity will not assist where (1) there has been undue delay on the part of the party seeking specific performance of a contract, (2) the other side has given reasonable notice to him that he should complete within a definite time and (3) the exercise of the equitable jurisdiction will result in injustice "

There is also a decision which will be useful to refer, namely *Bhawatsaran Singh* v. *Mithila Saran Singh*[1],. There a party by an order of the Court was required to deposit a certain amount in Court under a compromise and a time-limit was prescribed for it But there was no provision as to the effect of the non-payment of the said amount. In such a case the learned Judges held

" But if the time has expired and on account of absence of a provision in the petition of compromise or in the order as to the effect of non-payment, the order has not operated automatically, then the Court has seisin of the matter and can still deal with it "

Therefore applying the above principles to the facts of the present case, like the Patna case, there is no provision for the default clause in the preliminary decree. The respondent herein filed an application M P No 935 of 1962 for extension of time. But it is not clear whether it is filed in the execution side or in the original side itself. But the printed judgment reveals that the petition is filed on the original side in the District Munsi 's Court, Tindivanam But the learned Counsel for the appellant contends before me that this order should be taken to have been passed in the execution proceedings and if this is an order in the execution proceedings, certainly he is entitled to file an appeal Without going into this question whether M.P No 935 of 1962 has been filed on the original side or in the execution proceedings, I am of opinion that the Courts below have rightly decided that the time should be extended to enable the respondent to deposit the money as per the terms of the compromise decree

Whatever that might be, there is to my mind, as observed by the Federal Court when a concession is given for the reconveyance of the suit property, the respondent here should have implicitly discharged that obligation as stipulated in the compromise. But at the same time this is a specific performance of an agreement to reconvey the immovable property which originally belonged to the respondent. Taking all the facts into consideration and in the interests of justice, I direct the respondent here to deposit another sum of Rs. 200 in addition to Rs. 800 already deposited to the credit of the suit O S. No 297 of 1961, on the file of the District Munsif's Court, Tindivanam The respondent is entitled to have the reconveyance of the property by executing the decree against the appellant

The Civil Miscellaneous Second Appeal is dismissed subject to the above modification No costs. Time for payment two months.

No leave.

V.K. *Appeal dismissed.*

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1. A I.R 1953 Pat. 158.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE T. VENKATADRI

Sivagangai Ammal . *Appellant**

v

Jagadambal .. *Respondent.*

Maintenance—Charge—Properties charged under maintenance decree—Sale in execution to satisfy claims of arrears of maintenance—No extinguishment of the charge—Liability for future maintenance attaches to property—Omission to mention charge in sale proclamation in execution of charge decree—No waiver or estoppel of right to maintenance

The effect of the sale of the property, in execution of the charge decree for maintenance, to satisfy the claim for arrears of maintenance does not extinguish the charge completely and once for all It is only a sale to satisfy the particular claim The liability in respect of maintenance payable in future remains attached to the property

The omission to mention the existence of the charge for future maintenance in the sale proclamation on the first execution petition will not amount to a waiver of the right to future maintenance or estoppel against claiming such right

Appeal against the order of the Court of the Subordinate Judge, Cuddalore, dated 29th June, 1964 and made in C M A No. 26 of 1964 (E A. No. 1477 of 1963 in O S No. 334 of 1947, District Munsif's Court, Cuddalore).

K. V Venkataseshadri, for Appellant.

T. S. Ramaswami and *M. Srinivasan*, for Respondent.

The Court delivered the following

JUDGMENT —This appeal arises out of execution proceedings, wherein the appellant prayed the Court that her property, which was purchased free of charge for the maintenance decree should not be brought to sale by the decree-holder in O.S No 334 of 1947 on the file of the District Munsif's Court, Cuddalore. The Courts below have held that though the appellant purchased the property on the previous occasion in the execution of the maintenance decree, still the property is not free from the charge, and dismissed her application. It is against the orders of the Courts below, she has filed the present appeal.

In this appeal the same question arises for consideration *viz.*, whether the property is free from charge.

It is not disputed that the property in dispute has been subject to a charge under a maintenance decree obtained by the respondent against one Rajagopal Pandithan and others in O S. No. 334 of 1947.

The appellant purchased this property from Rajagopal Pandithan, and his wife Angammal for Rs. 2,000 on 24th August, 1949, during the pendency of the maintenance suit filed by the respondent. Therefore the sale dated 24th August, 1949, is not valid, as it is directly hit by the doctrine of *lis pendens*. But the appellant contends that, when the respondent brought the suit property for sale in pursuance of her maintenance decree, it was not mentioned that the property was subject to future charge and therefore it was sold for its real market value on 7th September, 1958 Under that sale, the property was purchased by one Kesava Koundar, the father of the appellant Subsequently, the said Kesava Koundar settled the property on the appellant on 19th April, 1961 under Exhibit A-1 registered settlement deed. The question turns upon whether the sale dated 7th September, 1958 was free from encumbrances, that is free from charge for ever. According to the appellant, this property was purchased by her father free of all encumbrances , whereas the respondent contends that the property was sold to the appellant's father under the previous execution proceedings subject to her rights to bring the very property to sale for future maintenance. In order to prove her case that this property was sold free of all encumbrances, the appellant filed Exhibits A-2 to A-5, A-7, A-8 and A-9. In the execution proceedings, it is true that no mention of any encumbrance was

*A A A O No 154 of 1964. 24th March, 1966.

made, and so the appellant would contend that the respondent waived the charge for future right of maintenance over the property mentioned in the execution application. On the other hand, the respondent would contend, that since a charge has been created by decree of Court, there was no necessity to specifically mention the same in the execution petition and that she has the right to bring the property for sale once again in execution of the charge decree for arrears of maintenance In order to find out whether this property was sold free of encumbrances, the Courts below considered whether the property was sold for its full value or the market value. The finding of the Courts below is that the price at which the appellant's father purchased the property in Court auction sale could not be said to be its real value, and I do not want to interfere with this finding of fact.

Once I come to the conclusion that the property was not sold for its real value, the next question is whether the respondent would be entitled to bring the same property once again for sale for arrears of maintenance accrued subsequent to the sale in favour of the appellant's father. A Division Bench of this Court in *Thangavelu* v. *Thirumalaswami*[1], have observed thus

> " so long as the decree for maintenance is a charge decree in respect of the property any purchaser who buys the property in execution of the decree for arrears of maintenance will only buy that property subject to the charge which still subsists in respect of future maintenance The liability in respect of future payments of maintenance always remains even after one or two sales have taken place after the realisation of the arrears payable under the decree It cannot be argued that the effect of the sale of the property to satisfy the claim for the arrears extinguishes the charge completely and once for all It is only a sale to satisfy the particular claim for the arrears and not to satisfy the maintenance decree as a whole, even as the charge for future maintenance still remains attached to the property and the auction purchaser gets the property only subject to the charge "

Ramakrishnan, J , has observed in *Tirugnana Sambanda Mudaliar* v. *Meenakshi*[2], that the omission to mention the existence of the charge for future maintenance in the sale proclamation on the first execution petition wherein the third party bought the property will not amount to a waiver of the right to future maintenance or estoppel against claiming such right. Following these two decisions I am of the view that, even though the appellant's father purchased the property in the previous execution proceedings, in execution of the maintenance decrees till the property is not free from liability for future maintenance. The appellant has therefore failed in her attempt to prevent the decree-holder from bringing the very same property to sale in exercise of her rights over the charged property.

The charged property consists of a number of items and it is not clear whether the other items have been exhausted. The Court has got inherent jurisdiction to give relief to the party concerned. In the circumstances, I direct the respondent-decree-holder to exhaust the other items before she exercises her right of sale over this property. The present execution petition may be kept pending, and the decree-holder permitted to renew it after she exhausts the remedies over the other items.

In the result, I allow the appeal to the extent indicated above. There will be no order as to costs. No leave.

V S — *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE T. VENKATADRI.

Shamlal and others . *Appellants**

v.

Messrs Parle's of Products Manufacturing Company (P.), Ltd , Bombay through the General Manager and another .. *Respondents.*

Trade Mark—" Pearl " and "Parle's"—Marks deceptively similar likely to cause confusion in the minds of public—Refusal of registration

The marks " Pearl " and " Parle's " are deceptively similar and therefore likely to cause confusion in the minds of the public The order of refusal of registration of the mark " Pearl " is justified.

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1 (1955) 2 M L J 618 at 622 2 (1962) 2 M L J 348

*A A O No 405 of 1964. 6th April, 1966.

Appeal under section 109 of the Trade and Merchandise Marks Act, 1958 against the order of the Assistant Registrar of Trade Marks, Madras-4 dated 31st March, 1964 and made in Application No. 204439 on his file and the opposition M A S 220.

R Rangachari and *M. Mustafayenkhan*, for Appellants.

T Dullip Singh, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against an order of the Assistant Registrar of Trade Marks in an application filed by the appellants for the registration of their trade mark containing *inter alia* the expression *Pearl* and the letters, *JJ* in Class 30 in respect of a designation of goods which was worded biscuits When this application was advertised in the Trade Mark Journal of 1st June, 1963, the respondents filed a notice of opposition under section 21 of the Act. The respondents are well-known manufacturer of biscuits. They are the registered proprietors of a reputed trade-mark consisting of the expression 'Parle's" under Mark No 9202 which has acquired a great reputation in the market. They contended that the mark sought to be registered by the appellants was deceptively similar to their mark and that therefore its registration was barred under section 12 (1) and (5) of the Act. The respondents also contended that having regard to their extensive reputation acquired by the trade mark ' Parle's' the registration of the appellant's trade mark was also barred under section 11 as likely to deceive or cause confusion.

The Assistant Registrar of Trade Marks framed issues, whether the prior registration of Trade Mark No. 9202 was not a bar to the registration of the appellant's mark, whether section 11 (1) was not a bar to the registration of the trade-mark and whether the appellants were entitled to registration under section 12 (3) because of honest concurrent user: After considering the relevant evidence in the case, the learned Assistant Registrar found that the mark sought to be registered by the appellants was deceptively similar to the mark of the respondents and was likely to cause confusion and that the motive of the appellants was not honest as they wanted to pilfer for themselves the reputation of the respondents, and dismissed the application. Aggrieved by this order, the applicants before the Assistant Registrar of Trade Marks have now filed the appeal.

The only point for consideration in this appeal is whether the marks ' Pearl ' and 'Parle's' are deceptively similar and therefore likely to cause confusion in the minds of the public I am reminded of the words of the Parker, J , in *Peqnotist Company Ltd.'s Application*[1], quoted with the approval in *Ciba Ltd v. Ramalingam*[2] :

> " You must take the two words, you must judge them both by their look and by their sound You must consider the goods to which they are to be applied You must consider the nature and kind of customer who would be likely to buy those goods In fact, you must consider all the surrounding circumstances , and you must further consider what is likely to happen if each of those trade-marks is used in a normal way as a trade mark for the goods of the respective owners of the marks "

Number of cases have been considered in the Court of Appeal and the House of Lords on the aspect of visual and phonetic similarity in the trade marks In In re *Electrix Ltd* [3] the House of Lords upheld the decision of the Court of Appeal disallowing an application to register the word 'Lectrix' as it was identical in sound with 'Electrix' which had been earlier registered with respect to the same kind of goods. Similarly in *Societe Mon savon Oreal and Golden Ltd* v *Coiffeur Supplies Ltd* [4] it was held that the particular mark ' Plix ' would be infringed by the word ' Palexe ', as the latter very closely resembled the former and as the dealers might use the names verbally in such a way as to cause confusion. So also in *Velve-Glo*[5], the mark ' velveglo ' was held to be too similar to the mark ' velglo ' which had earlier been registered in respect of the same goods and therefore registration was refused In

1 23 R P C 774
2 1957 B L R 548, 566
3 1959 R P D T M C 283
4 1961 R P C 219
5 1961 R P C 255

our own High Court, number of cases have been decided on the aspect of visual and phonetic similarities in respect of the same goods In *Parry & Co Ltd* v *Perry & Co* [1], a Division Bench of this Court held that the marks 'Parry's' and 'Perry's' so closely resembled each other that there was real danger of deception or of causing confusion if they were used in respect of the same goods, and that the words used were strikingly similar when pronounced and were also deceptive to the eye if looked at from a distance In *Ciba Ltd* v. *Ramalingam*[2], the word 'Cibol' was considered as closely resembling the word 'Ciba' which had previously been registered. In *Corm Products Refining Co.* v *Shangrila Food Products*[3], the Supreme Court held that the words, 'Gluvita' and 'Gulcovita' would lead to confusion and render deception likely in view of the similarity of the two trade marks In *Chinnakrishnan Chettiar* v. *Sri Ambal & Co.*[4], Anantanarayanan, J., in a very considered judgment, wherein he has reviewed the English case law also on the subject, has observed that the test of phonetic similarity is one which has to be applied on broad principles, that the words have to be judged both by appearance where both are incorporated in visual designs and also by phonetic affinities and that the nature of the goods to which they are to be applied and the nature and kind of customers who might buy such goods are all relevant circumstances The learned Judge has further observed that the test is that of a customer who knows only one of the two expressions namely the pre-existing one and might have only an imperfect recollection of it, when demanding a favourite brand. The question according to the learned Judge, is whether there is a likelihood of deception by the overall and phonetic similarity of the two expressions of words. Finally, the Division Bench of this Court held that phonetic similarity did exist between the words 'Sri Andal' and 'Sri Ambal'. It is also useful to refer to the observations of Jagadisan, J., who disposed of the appeal singly, which have been quoted by the Division Bencn at page 210

> "The words Ambal and Andal have such great phonetic similarity that they are indistinguishable having the same sound and pronounciation In whatever way they are uttered or spoken, slowly or quickly, perfectly or imperfectly, meticulously or carelessly and whoever utters them wherever they are uttered, in the noisy market place or in a lonely secluded area, over the phone or in person, the danger of confusion between the two phonetically allied names is imminent and unavoidable "

In the recent decision of the Supreme Court in the case of *Amritdhara Pharmacy* v. *Satva Deo Gupta*[5], the words 'Amritdhara' and 'Lakshmandhara' came up for consideration as to whether they were likely to cause confusion. It was said that the question had to be approached from the point of view of a man of average intelligence and imperfect recollection and to such a man the overall structural and phonetic similarity of the two names was likely to cause confusion.

On a consideration of the case-law and the facts of the case, I am of the view that the appellants have not discharged the onus which lies on them of proving that a simultaneous, normal and fair use of the competing marks will not lead to confusion or deception among the members of the public. The finding of the Assistant Registrar is correct and cannot be assailed in this appeal

In regard to the question of concurrent user, I do not feel justified in interfering, as I am in agreement with the finding of the Registrar that the motive of the appellant was not honest.

In the result, this appeal is dismissed. But there will be no order as to costs.

V S. *Appeal dismissed.*

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1 (1963) 2 M L J. 311
2. A I R 1958 Bom 56
3. (1960) S C J. 509 A I R 1960 S.C 142.
4 (1964) 2 M L J 206
5. (1963) 2 S C R. 484. A I R 1963 S C. 449

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI.

C. D. Sekkizhar and another .. *Petitioners**

v.

The Secretary, Bar Council, High Court Buildings, Madras and others . *Respondents*

Advocates Act (XXV of 1961), *section* 59 (1)—*Powers under—Advocates (Removal of Difficulties) Order,* 1966(*S.O No* 162, *dated* 10*th January,* 1966)—Ultra vires *the Government under the section*

Section 59 (1) entrusts the Central Government with a limited power for removal of difficulties It can be invoked only for removal of difficulties arising in giving effect to the provisions of the Act and not difficulties arising *aliunde* The sub-section makes it manifest that any provisions made for the removal of difficulties should not be inconsistent with the purposes of this Act

The direction in section 8 of the Act cannot therefore be modified, altered or neutralised in exercise of the powers conferred by section 59 Further the difficulty is not in the working of section 8, but one that may arise in the event of the Advocates (Amendment) Act, 1965 becoming the law (*i e*) arising *aliunde*

The order dated 10th January, 1966, is *ultra vires* the powers of the Central Government under section 59 (1) of the Advocates Act, 1961

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 1st respondent to forbear from conducting the election to the Bar Council of Madras scheduled to be held on 5th November, 1965

S Mohan, for Petitioner in W P. No 4313 of 1965 and 2nd Respondent in C.M P No. 1446 of 1965.

A Balasubrahmaniam, for 1st Respondent in both petitions.

G. K. Damodar Row, for 3rd Respondent in W P. No 4313 of 1965

G Vasantha Pai, for 2nd Respondent in W.P. No. 4313 of 1965 and Petitioner in C M P No 1446 of 1966 in person.

G. Ramanujam, Standing Counsel on behalf of Government of India

The Court made the following

ORDER :—While disposing of W.P. No. 4313 of 1965 on 6th January, 1966† this Court said

" The Bar Council is entitled to proceed with the election from the place where it was stopped by the stay orders of this Court 25th March, 1966, is fixed as the date for polling "

Since then the Government of India made a notification published in the Gazette of India Extraordinary dated 10th January, 1966. This notification is captioned as the Advocates (Removal of Difficulties) Order, 1966 and was to take effect from 1st November, 1965. The substantive part of the notification reads

" *Extension of term of office of elected members of the State Bar Councils required to retire under section* 8 *of the Advocates' Act,* 1961—Every elected member of a State Bar Council due to retire after the 1st day of November, 1965, under section 8 of the said Act on the expiration of the second year from the date of such reconstitution, shall, notwithstanding such expiration, continue to hold office for a further period of one year with effect from the date of such retirement "

In view of this notification the Bar Council wanted the petition to be spoken to for further orders with reference to the directions contained in the order of this Court, which is extracted at the outset.

If the notification is valid and enforceable, the direction given by this Court fixing the date for polling will have to be cancelled. The Bar Council of India and

* W P No 4313 of 1965 and
C M P No 4146 of 1966 8th April, 1966.

† (1966) 2 M L J 35.

the Government of India were given notice of the further proceedings arising out of the request of the Madras Bar Council for further directions. Mr. G. Vasantha Pai, who was one of the respondents in the Writ Petition, appears in person and contends that the notification is without jurisdiction and is invalid On the other hand, Mr. G. Ramanujam for the Government of India and Mr G. K. Damodara Rao for the Bar Council of India maintain that the notification is within the purview of section 59 of the Advocates Act, 1961. In the counter-affidavit filed on behalf of the Government of India it is stated that the impugned notification was issued to remove difficulties in giving effect to the provisions of the Advocates Act, 1961. The difficulty is explained to be this The Bar Council of India represented to the Government of India that elections to the State Bar Councils involve considerable expenditure and suggested suitable amendment to section 8 so as to provide that elections may be held every third year instead of every second year with one-half of the members retiring instead of one-third. A Bill entitled Advocates' (Amendment) Bill, 1965, has been introduced to give effect to the suggestion and it is said that the Bill was passed by the Rajya Sabha, but for want of time, it could not be passed in the Lok Sabha during the last session In the circumstances, in anticipation of the passing of the Bill, some of the Bar Councils did not take action necessary under the Bar Council Rules for the holding of the elections. But in Madras, Mysore, and Assam, where the two years had already expired, the question arose whether the elections should be held or not. In Madras the proceedings to hold elections have already been taken. In other States the period of two years was due to expire The Government of India was therefore requested by the concerned Bar Councils that immediate action should be taken to continue the existing member so as to avoid unnecessary expenditure on elections particularly in view of clause 4 of the Advocates' (Amendment) Bill, 1965 Section 4 of the Bill seeks to amend section 8 in the following manner

"in sub-section (1) of section 8 for the words 'one-third' and 'every second year' the words 'one-half' and 'every third year' shall be and shall be deemed always to have been respectively substituted"

Section 59 which is the only section pressed in aid by learned Counsel for the Government of India entrusts the Central Government with a limited power for removal of difficulties. Sub-section (1) is as follows

"If any difficulty arises in giving effect to the provisions of this Act, particularly in relation to the transition from the enactments repealed by this Act to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the purposes of this Act, as appear to it to be necessary or expedient for removing the difficulty"

It is obvious that this section can be invoked only for removal of difficulties arising in giving effect to the provisions of the Act and not difficulties arising *aliunde*. The intention of this sub-section is to enable the Central Government to resolve difficulties arising in the transition period and on account of the repeal of the earlier Acts relating to Advocates. The sub-section also makes it manifest that any provision made by the Government of India to remove difficulties should not be inconsistent with the purposes of the Act. That means no provision can be made under section 59 which will run counter to any of the express provisions in the Act. Section 8 is clear that one-third of the members first elected to each Bar Council shall retire on the expiration of every second year This section is mandatory. In my opinion the direction in section 8 cannot be modified or altered or neutralised in exercise of the power under section 59, for, such exercise will be inconsistent with the direction contained in section 8 which is one of the purposes of the Act. It cannot be pretended in this case that any difficulty arose out of the working of section 8 itself. The counter-affidavit filed on behalf of the Central Government shows that the difficulty, on the other hand, was not in the working of section 8, but may arise in the event of the Bill becoming the law That is clearly not a difficulty within the purview of section 59. On both the grounds, therefore, namely, that the notification is inconsistent with section 8 and that the difficulty sought to be removed is not one in the working of the Act, the notification must be held to be *ultra vires* the powers of the Government under section 59.

It follows that the Madras Bar Council cannot give effect to this notification. It must proceed under section 8 of the Advocates Act, 1961, as it exists. In modification of the date originally fixed by this Court, 8th July, 1966, is fixed as the date for polling

K.G S. — *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K. VEERASWAMI AND MR JUSTICE T. VENKATADRI

S Rajam, Proprietor, Murray & Co . *Appellant**

v

The Indian Union, represented by the Secretary to Government, Ministry of Rehabilitation, New Delhi . *Respondent.**

Constitution of India (1950), Article 299—Agreement between a private party and the Government—Requirements to be fulfilled under Article 299 for validity of

Contract Act (IX of 1872), section 70—Agreement by plaintiff to render services at remuneration to be fixed by defendant—Enforceability—Power of Court to fix reasonable remuneration

It is well settled now that, while the requirements of Article 299 of the Constitution of India are mandatory and should be complied with in order that an agreement entered into by a private party with the Government in the exercise of its executive power be enforceable, it is not necessary that there should be drawn up a formal agreement as such, but there could be a valid contract entered into by correspondence provided the two requirements, namely, (1) it should be expressed to be made by the Governor of the Province, and (2) it should be executed on behalf of the Governor by such persons and in such manner as he might direct or authorise, are complied with

Where a contract is entered into between two persons, that the former would render services to the latter at a remuneration to be fixed by the latter, the validity or enforceability of the contract will depend to a certain extent on the construction of the contract and whether the fixation of remuneration was entirely within the discretion of the obligee or whether the agreement merely meant that the obligee should fix the rate, the intention of the parties being that the service contemplated was rendered not gratuitously If by the contract it is left entirely to the discretion of one of the parties thereto whether or not to pay remuneration the contract would be unenforceable for the simple reason that the person in whom the discretion is vested may or may not exercise it but if on the other hand, the contract is that the service rendered thereunder was not meant to be gratuitous and meant that one of the parties thereto should fix the rate, the rate fixed is required to be just, fair and reasonable and such a contract is enforceable

Where the contract is that the service rendered was not meant to be gratuitous and that one of the parties should fix the remuneration and the party so empowered fixes the remuneration at a rate *ex facie* unreasonable and unjust, the aggrieved party will not be without a remedy The Court in such a case has the power to intercede and fix a reasonable remuneration Courts do possess that power in the interests of justice

Appeal against the decree of the City Civil Court (Second Assistant Judge), Madras dated 23rd September, 1960, and passed in Original Suit No 623 of 1958

K Rajah Ayyar, for *L. V Krishnaswamy Ayyar*, for Appellant

Government Pleader (*A Alagiriswami*) and *C Rangaswamy*, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J —The controversy in this appeal by the plaintiff is as to the rate of commission at which he is entitled to be paid for certain auction sales of evacuee properties in Madras, Bangalore, Mysore, Ootacamund and Coonoor, which he held in five batches between 22nd February, and 26th June, 1955, on behalf of the defendant He has been paid at one per cent of the sale proceeds in respect of the first batch of sales held between 22nd February, and 26th February, 1955, at Madras With regard to the other batches of sales between 7th April, and 16th April, 1955, 26th April, and 1st May, 1955, 9th May and 13th May, 1955 and 26th June, and 27th June, 1955 the defendant paid the plaintiff only a sum of Rs 7,324 56 against a claim of Rs 23,098 35 The suit is to recover the difference, the main ground of the appellant being that there was no reason to make a distinction between the sales made prior to 1st April, 1955, and those subsequent thereto, as the work involved in respect of both the sales were just the same, and there was no reason why

* Appeal No 273 of 1961 1st April, 1965

the general rule as to the reasonable quantum of remuneration payable in respect of sales should not be applied On the ground that certain sales held on 28th April, and 10th, 12th and 13th May, 1955, were for prices below sixty per cent of the reserve price, the defendant denied liability to pay any commission whatever. The plaintiff contended that the sales were effected by him not gratuitously and was, therefore, entitled to a reasonable remuneration

The suit was resisted by the defendant pleading an agreement fixing the rate of compensation and stipulating that for sales fetching prices less than sixty per cent. of the reserve price no commission would be payable The agreement set up was that the plaintiff had agreed to receive commission at such rate as the Government might fix

The Court below framed a number of issues on those pleadings, but substantially it found that the agreement set up by the defendant was true and that remuneration already paid to the plaintiff was in accordance therewith On that view it dismissed the suit.

On behalf of the plaintiff, who has appealed to this Court, his learned Counsel, Mr K Rajah Iyer, contends (i) that if there was a concluded agreement between the plaintiff and the defendant fixing the rate of commission, it was void for non-compliance with the mandatory provision of Article 299 of the Constitution, and that as the work done by the plaintiff was not intended to be gratuitous, he was entitled to commission at a reasonable rate , (ii) that, alternatively, if the agreement was, for any reason, valid, it failed to fix a rate of commission and that, in any case, the parties meant that a reasonable rate of commission would be paid for the work done by the plaintiff On the other hand, the learned Government Pleader contends that, though there was no formal agreement drawn up and executed, there could be a valid agreement entered into by correspondence between the parties after conforming to the requirements of Article 299 of the Constitution and that an agreement by which the plaintiff agreed to accept such rate of commission as may be fixed by the defendant is valid and it is not open to the Court to depart from its terms and tenor and fix a rate which it may consider to be reasonable

Before we examine these contentions, a few more facts may be noticed The plaintiff was appointed as a commission agent by the Regional Settlement Commissioner, Bombay, acting for the Government of India, Ministry of Rehabilitation, by a letter, dated 28th January, 1955 The appointment was restricted to the conduct of auction sales of evacuee property, and buildings in Madras from 22nd February, to 26th February, 1955, and the letter said that the plaintiff would be given commission on the auctions as would be fixed by the Government of India from time to time On 12th February, 1955, the Deputy Secretary to the Government of India, Ministry of Rehabilitation, by a letter of that date asked the plaintiff's concurrence to and execution of a formal agreement a draft of which was enclosed with it One of the clauses in this draft stated that the rate of commission would be as specified in clause 13, and this clause contained certain rates of commission calculated on different specified slabs The plaintiff immediately wrote back on 16th February, 1955, expressing his unwillingness to accept a rate less than one per cent as commission On 4th March, 1955, there was a telegram from the Regional Settlement Commissioner to the plaintiff.

"Your letter sixteenth February Stop 57 properties in Madras programmed sale from seventh to fifteenth April, Stop telegraph you agree undertaking auction on terms whatever decided by Government"

The plaintiff replies the same day :

"Your telegram March third Stop Agree to arrange April auctions on terms to be decided by Government Stop fourteenth April Tamil New Year's Day hence holiday and not suitable for auctions"

This reply telegram was followed by a letter of the plaintiff, dated 4th March, 1955, in which he stated that as suggested by the Regional Settlement Commissioner, he had agreed to conduct all sales to be arranged from 7th April, onwards on terms

that might be decided by the Union Government. About 21st March, 1955, or so the Government of India, Ministry of Rehabilitation addressed a letter to the plaintiff enclosing a draft revised agreement for his signature Clause 14 of this draft contained the rates of commission on slab basis and by one of its sub-clauses, it stipulated that where a bid in respect of any property was less than sixty per cent of the reserve price, no commission would be paid, but only the actual advertisement charges as determined by the Regional Settlement Commissioner The plaintiff did not return this draft duly executed by him, but entered into correspondence with the relative officers asking for one per cent commission Eventually a letter, dated 2nd June, 1955, of the Ministry of Rehabilitation addressed to the Regional Settlement Commissioner, a copy of which was marked to the plaintiff with a post-script, made it clear that the plaintiff's request for raising the commission to one per cent of the sale proceeds was not accepted Further correspondence ensued including the plaintiff enclosing his bills claiming commission at the rate of one per cent On 27th June, 1955, the Ministry of Rehabilitation affirmed its earlier stand that commission would not be paid at the rate of one per cent By a letter, dated 26th August, 1955, the same Ministry further intimated the plaintiff that his request for commission at one per cent was separately under consideration The ultimate reply of the Ministry was, dated 4th November, 1955, by which it sanctioned to the plaintiff commission at the rate of one per cent. for auctions conducted prior to 1st April, 1955, but as regards auctions held subsequent thereto, it said :

"Regarding the auctions conducted by the firm after 1st April, 1955, the rate of commission should be paid as contained in the agreement and also agreed to by the firm Vide their telegram, dated 4th March, 1955, a copy of which has been enclosed by you with your letter under reply "

This communication was actually addressed to the Regional Settlement Commissioner, but a copy of it was also sent to the plaintiff In their copy, the Ministry further stated that the plaintiff's request for higher rates of commission had been considered in the light of the facts furnished by him from time to time, but it was regretted that the same could not be accepted This drove the plaintiff to the suit after a notice under section 80 of the Code of Civil Procedure

On the assumption that there was an agreement between the parties fixing the rate of commission, Mr Rajah Ayyar, argues that inasmuch as it was not put in the proper form and it did not comply with the a mandatory requirements of Article 299 of the Constitution, it was void He says, therefore, that in the absence of any binding agreement the plaintiff would be entitled to be paid a reasonable rate of commission to be fixed by this Court Learned Counsel relies on *New Marine Coal Co. (Bengal) P Ltd* v *Union of India*[1], and *Karamshi Jethabhai* v *State of Bombay*[2] Both these cases were decided with reference to section 175 (3) of the Government of India Act, and in the first of these cases the Supreme Court, following its earlier judgment in *State of West Bengal* v *M/s B K Mondal*[3], held that the requirements of section 175 (3) were mandatory, that their non-compliance would render the contract void and unenforceable, and that at the same time, if in pursuance of such a void contract a party had performed his part, and the other had received the benefit of the performance of the contract by the former, the former would be entitled to compensation on the principles of section 70 of the Contract Act In the second case a contract was sought to be made out of correspondence between the parties, and the question was whether it complied with section 175 (3) Pointing to the requirements of that section, Subba Rao, J , observed at page 999 .

"This section laid down two conditions for the validity of such a contract, namely, (1) it should be expressed to be made by the Governor of the Province, and (ii) it should be executed on behalf of the Governor by such persons and in such manner as he might direct or authorize"

On the facts before it, the Supreme Court was of the view that the contract by correspondence did not satisfy these requirements. In reaching that conclusion the Supreme Court distinguished *Seth Bhikraj Jaipuria* v *Union of India*[4], and *Union of*

1 (1964) 2 S C R 859
2. (1964) 6 S C R 984
3 (1962) 1 S C R 876 (Supp)
4 (1962) 2 S C J 479 (1962) 2 S C R 880

India v *A L Ralla Ram*[1]. Both these cases recognised that there could be a contract by correspondence, but its validity would depend on compliance with the requirements of section 175 (3), but on the facts in each of those cases it was held that the contract did conform to that statutory provision It is, therefore, well settled now that, while the requirements of Article 299, whose terms are identical with those of section 175 (3), are mandatory and should be complied with in order that an agreement entered into by a private party with the Central or State Government in the exercise of their executive power be enforceable, it is not necessary that there should be drawn up a formal agreement as such, but there could be a valid contract entered into by correspondence provided the two requirements, pointed out by the Supreme Court in *Karamshi Jethabai* v *State of Bombay*[2], are complied with

Learned Government Pleader contends that the point based on Article 299, had never been raised at any earlier stage, not even in the grounds of appeal and that if it had been raised at the trial the defendant would have by further evidence satisfied the Court that the agreement regarding the rate of commission in this case conformed to Article 299 He also points out that there could be a valid agreement entered into by exchange of telegrams as it happened in *M/s Chiranjilal* v *Union India*[3] We are inclined to think that his contention is not without force, and we recognized that the defendant is naturally handicapped in the appeal before us in satisfying this Court on that point But in view of the alternative argument of Mr K Rajah Iyer, which we think is one of substance we do not propose to base our judgment on his first point with reference to Article 299 of the Constitution.

As we said, Mr Rajah Iyer's alternative contention is the agreement, such as it was here, never fixed any firm rate of compensation. The material correspondence between the plaintiff and the Ministry of Rehabilitation has already been referred to There is no doubt that the two telegrams of 4th March 1955, one from the Regional Settlement Commissioner and the other in reply by the plaintiff, did bring about a consensus, the effect of which was the plaintiff agreed to hold auctions in April on terms to be decided by the Government Mr Rajah Iyer's contention is that this meant that the plaintiff would be paid a reasonable rate and no less and that, as a matter of fact, the letter of the Ministry of Rehabilitation, dated 4th November, 1955, was totally unavailing to fix a rate On the latter part of the contention, we see that, while this letter of 4th November, 1955, said that the rates of commission should be paid as contained in the agreement, the apparnet reference being to the draft agreement enclosed with the letter of the defendant, dated 21st March, 1955, or so, it also stated that those rates were fixed as agreed to by the plaintiff In point of fact, it is clearly inaccurate to state that the plaintiff had at any time prior to 4th November, or later agreed to the rates contained in the draft agreement enclosed with the letter of March, 1955 But the letter of 4th November, 1955, presupposes that such an agreement of the plaintiff was contained in his telegram, dated 4th March, 1955 This assumption, again is not warranted, because both before and after the telegrams the plaintiff made it quite clear to the defendant or its officers that he could not agree to the terms contained in the first draft agreement enclosed with the letter, dated 12th February, 1955 Mr Rajah Iyer's argument goes further namely, that even if the letter of the Ministry of Rehabilitation, dated 4th November, 1955, fixed the rate as contained in the draft agreement aforesaid, the whole correspondence would make it clear that the contract only meant that the plaintiff would be paid a reasonable rate

Questions have arisen as to the validity and enforceability of an agreement entered into, for instance, by *A* with *B* that the former would render service at a remuneration to be fixed by the latter Decided cases show that the answer to the question depended, to a certain extent on the construction of the particular contract, and whether such a fixation was entirely within the discretion of the obligee or whether the agreement merely meant that the obligee should fix the rate, the intention of the parties being that the service contemplated was rendered not gratuitously

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1 (1963) 3 S C R 164
2. (1964) 6 S C.R. 984.
3 A I R 1963 Punj 372.

In *Taylor* v *Brewer*[1], the promise to pay such remuneration as should be deemed right was held to be bad for uncertainty In *Roberts* v *Smith*[2], the agreement was :

"I agree to accept the appointment of secretary first, a salary of per annum . . if the company be completely registered and put into operation , if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of and your means can afford "

It was held that there was no contract upon which the plaintiff could recover any part of the salary In this country too, as is apparent from *Ramaswamy* v *Rajagopala*[3], such a contract or a contract worded more or less similarly was regarded as unenforceable That was a case of patta containing an agreement to pay whatever rent the landlord may impose The Court held that this stipulation was void for uncertainty But a different approach to such contracts or contracts worded more or less similarly is found in some of the later decisions, both in England as well as in this country. In *Bryant* v *Flight*[4], the agreement was

" I hereby agree to enter your service as weekly manager, commencing next Monday, and the amount of payment I am to receive I leave entirely to you "

Taylor v *Brewer*[1], though cited, was not followed, and it was held, Parke B, dissenting, that the contract in that case implied that the obligor was to be paid something at all events for the services performed, and that the jury in an action on a *quantum meruit*, might ascertain what the obligee acting, *bona fide* would be or ought to have been awarded This approach more or less on the basis of *quantum meruit* was followed and applied by the House of Lords in *Way* v *Latilla*[5] It was found in that case that the implied contact between the parties there, was not meant to be gratuitous The House of Lords held that the appellant, who was the obligor, was entitled to a reasonable remuneration on the implied contract to pay him *quantum meruit* *Powell* v *Braun*[6], was also a case of service contract providing that the claimant there would be paid a bonus on the net trading profits of the previous financial year When it was not paid in a particular year, there was a claim therefor Construing the contract, the Court of Appeal said that it was intended by the parties, not that the payment of bonus should be within the discretion of the defendant, but that he should pay the plaintiff a reasonable sum Lord Denning, among others, observed,

"It was said in the course of the argument that no case has been found in the books where a *quantum meruit* has been awarded in a case like the present I hope that this case will provide the deficiency In lieu of a rise in salary, the defendant agreed to pay the plaintiff a bonus each year on the net trading profit The learned judge said that what he should pay was matter for the defendant in his discretion, that is, whether he should pay something or nothing I do not agree I think the defendant plainly bound himself to pay something The precise amount would not be an amount in his unfettered discretion It would be amount within his reasonable discretion, that is, it would be the amount which a fair and just man would pay in the exercise of a reasonable discretion "

Mr Rajah Iyer strongly relies on these observations of Lord Denning and argues that here what the parties meant was that the plaintiff would be paid a fair, just and reasonable rate of compensation In *Vellayam Chetty* v *Kulandavelappa Chetty*[7], a case of principal and agent, a Nattukottai Chetty principal promised to give his Burma agent something as remuneration in respect of sums collected from his old debtors without specifying the amount Coutts Trotter, J , as he then was, and Srinivasa Ayyangar, J , repelled the contention that the contract was not enforceable, and held that it was a question depending upon the circumstances of each case whether an alleged agreement of this sort constituted an unqualified contract to give something or whether the party agreeing had the option of giving anything or nothing at all The Court found that the contract in that case was enforceable Coutts Trotter, J , observed at page 753

"That being so, the question arises whether this would constitute in law an enforceable contract. Reliance was placed for the Appellants on two cases *Taylor* v *Brewer*[1] and *Roberts* v *Smith*[2] In these cases, it was held that a promise to pay reward to deserving persons may be construed in certain circumstances with certain form of words to mean 'I may or may not give anything If I do give

1. 105 E R 108
2. 157 E R 861
3. (1887) I L R. 11 Mad 200
4. 151 E R 49
5. (1937) 3 All E R 759
6. (1954) 1 All E R 484, 486.
7. (1915) 29 M L J 749.

something I will give exactly what I deem right ' On the other hand, the other side relied on the case of *Bryant* v *Flight*[1] where slightly different words were held to mean 'I will give you something, though that something must be determined latter ' The dividing line may be different in particular cases The principle is quite clear Is there an unqualified contract to give something or is the option of giving anything at all left to the discretion of the proposed donor "

Secretary of State for India v *Volkart Brothers*[2], related to renewal of a 99 years lease upon such terms and conditions asshould be judged reasonable Coutts-Trotter, J , agreeing with Venkata Subba Rao, J , on a difference between him and Krishnan, J., held that the term for renewal was enforceable on the ground that it was so worded, because it was thought that it might not be reasonable to fix a rent after the lapse of the first century for the whole of the next century The learned Chief Justice considered that the term under the contract was not too vague to be enforced

Through these cases it is clear that if by a contract it is left entirely to the discretion of one of the parties thereto whether or not to pay remuneration, the contract would be unenforceable for the simple reason that the person in whom the discretion is vested may or may not exercise it but if on the other hand, the contract is that the service rendered thereunder was not meant to be gratuitous and meant that one of the parties thereto should fix the rate, the rate fixed is required to be just, fair and reasonable This distinction is pointed out in Halsbury's Laws of England, Simonds edition, Vol. 8 paragraph 330;

"Where services are performed under an agreement that the remuneration shall be in the discretion of the employer, the question whether the employer has right to determine whether any remuneration at all shall be paid, so that his decision is a condition precedent to any claim, or merely has the right to fix the amount of the remuneration, is a question of construction and intention in each particular case "

Where the exercise of discretion is a condition precedent, the contract will, of course, be unenforceable but in other cases the contract is good and will be enforceable *Illustration (e)* to section 29 of the Indian Contract Act shows that a contract by which *A* agrees to sell to *B* certain goods at a price to be fixed by *C* is perfectly good and enforceable But the learned Government Pleader argues that in case of contracts in which *A*'s remuneration is to be fixed by *B*, the other party to the contract which on principle is hardly distinguishable from the other type of contracts, there is no power in Courts to interfere with the discretion vested in *B*, and proceed to determine what it considered to be a fair and reasonable rate of remuneration In support of his contention he relies on *Kofi Sunkersette Obu* v *A Strauss & Co Ltd*[3] We do not think that this authority supports his proposition. The contract there was this :

"The company has agreed to remunerate my services with a monthly sum of fifty pounds to cover my personal and travelling expenses A commission is also to be paid to me by the company which I have agreed to leave to the discretion of the company "

The Privy Council held that on this contract it was beyond the competence of any Court to grant any relief to the employee The Board would appear to have expressed its view mainly on the basis of its own construction of the contract, as will be evidenced, from its following observation at page 250 .

"In their Lordships' opinion the relief which the appellant claims, namely, an account and payment of commission based on rubber purchased or shipped, is beyond the competence of any Court to grant The Court cannot determine the basis and rate of the commission To do so would involve not only making a new agreement for the parties, but varying the existing agreement by transferring to the Court the exercise of a discretion vested in the respondents "

The Privy Council, as we think, proceeded on the view that where payment of commission as remuneration was entirely left to the discretion of a party, the Court cannot take upon itself to exercise that discretion This case merely illustrates, in our view, the distinction between the two classes of contracts which we mentioned, one of them leaving remuneration entirely to the discretion of a party and the other not leaving so any discretion but requiring or expecting the other party to fix a remuneration the intention of the parties being that the services is not to be rendered gratui-

1. 151 E R 49
2. (1926) 52 M L J 443 I L R 50 Mad. 595
3. (1951) A.C 243.

tously Learned Government Pleader referred us to *Anson's Law of Contract*, twenty-first edition, at page 164, where the learned author stated —

> " There is still a reluctance to walk upon the shifting sands of public policy and to absolve the parties from an agreement into which they have formally entered on the grounds merely that it is unreasonable It may be that the law will expand to meet changing economic conditions, but it cannot yet be said with certainty that this power exists

These observations, in our opinion, do not apply to contracts in which one of the parties is obliged to fix a rate of remuneration in the expectancy of which service is rendered, which means a reasonable remuneration.

In this case, by the two telegrams of 4th March, 1955, what did the parties mean? Whatever they meant, surely the intention was not that the payment of remuneration was left to the discretion of the defendant On the other hand the telegrams are clear that the plaintiff would be paid on terms to be decided by Government The only term in controversy is as to the rate of commission and the telegrams confined themselves to that term Supposing, in a case like that the defendant fixed a rate, but *ex facie* it was unreasonable and unjust, is it to be supposed that the plaintiff will be left without a remedy and will not the Courts in such cases have the power to intercede and fix a reasonable remuneration in spite of the rate fixed by the defendant? In our view, the Courts do possess that power in the interests of justice. They in a sense but enforce the contract to fix a reasonable remuneration We are satisfied, in the context of the correspondence, in this case, that by the two telegrams what the parties thereto meant was that the defendants should fix a reasonable and fair remuneration Right from the beginning to the end of the correspondence the plaintiff had been insisting and making it very plain that the rates specified in the draft agreements were not acceptable to him and that he should be paid commission at the rate of one per cent It is in the light of this we have to see what the parties might have intended—surely by accepting the telegram of the Regional Settlement Commissioner, the plaintiff did not mean to convey that he was accepting the terms provided for in the draft agreements His acceptance was in the expectation, as we said, of a fair and reasonable rate of commission We hold that the plaintiff would be entitled to such a rate of compensation, namely, a fair and reasonable one

Unfortunately in this case the trial Court has not proceeded on that basis and there was no material placed before the Court below or before us to determine what would be a fair and reasonable rate of commission It was argued that for the sales prior to 1st April, 1955, the plaintiff was paid by the defendant at the rate of one per cent and there was no reason why a different rate should be adopted in respect of sales effected subsequent to that date. On the other hand, the learned Government Pleader invites attention to some of the agreements the Union of India had entered into with certain third parties in 1955, and contends that the rate agreed to there should be regarded as fair and reasonable The Court below referred to these agreements, but was of the view that they had not been proved Even apart from that, there is no material before us in the light of which was can judge whether the rates in those agreements were reasonable and under what circumstances We think that the proper course would be to remit the matter to the Court below for fixing a fair and reasonable rate of commission to be paid to the plaintiff after giving the parties an opportunity to adduce such further evidence as they may choose on the question The judgment and the decree of the Court below are set aside and the suit is remitted for disposal in the light of the observations contained in this judgment. The cost of this appeal will be costs in the cause. The Court-fee paid on the memorandum of appeal will be refunded.

V.K. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Devasahayam Nadar Savarimuthu Nadar (deceased), by L Rs. . *Appellants**

v.

Poothathan Nadar Samuel and otheis *Respondents*

Travancore Oodukoor Settlement Proclamation (1122), sections 24 and 29—Oodukoor Settlement Rules, Rules 27 and 35—Oodukoor award—Failure by Settlement Officer to sign and seal award as required by rule 27—If renders the award a nullity—If binding on a sharer whose name does not appear in register of Oodukoor holdings and who was not a party to Oodukoor proceedings not having been served with notice of same—Suit challenging award under section 29—Limitation—Starting point

Section 24 of the Travancore Oodukoor Settlement Proclamation provides that at the close of the settlement enquiry in respect of each Oodukoor holding the Settlement Officer shall pass an award settling the holding among the various shareholders This section does not require the signing or sealing of the award Signing and sealing of the award are required only by rule 27 of the Oodukoor Settlement Rules But this requirement cannot be said to be a condition precedent for giving validity to the award The award is complete as soon as it is made and there is nothing in the Oodukoor Settlement Proclamation or in the Rules which invalidates the award, if it is not signed or sealed. So startling a result would need clear and precise words

Firm Gokal Chand v *Firm Nand Ram,* L R 66 I A 12 (1939) 1 M L J 56 A I R 1938 P C. 292 and *Surendra Singh* v *State of U P* , 1954 S C J. 12 (1954) 1 M L J. 50 A I R. 1954 S C 194, rel. on.

An Oodukoor Settlement award made under section 24 will be binding on a person interested in a share in the Oodukoor holdings but whose name does not appear in the Register of Oodukoor holdings prepared under section 7, though he was not a party to the settlement proceedings and no notice of the proceedings was served on him Section 8 requires notice only to Oodukoor holders whose name appears in the register prepared under section 7 With regard to other persons interested, the publication of the notice of the proceedings in the *Official Gazette* under section 6 shall be treated as sufficient notice to them Thus, if a person having any interest in a share in the holdings fails to get his holding included in the register under section 7 he cannot claim that notice should be served on him and if he fails to appear before the Settlement Officer in response to a notice under section 6 within the time specified under section 10, the Officer can proceed with the settlement proceedings and pass an award which will be binding on all persons interested. Section 29 however, provides a remedy to a person interested, in that he can have the award cancelled or modified by a suit instituted in a civil Court within a year from the date of the award

Rule 35 of the Oodukoor Settlement Rules provides that on passing of an award by the Settlement Officer a notice in Form K shall be issued to all the parties in the case intimating the purport of the decision So far as parties to the case are concerned the period of one year for filing a suit under section 29 will therefore run only from the date of receipt of the notice in Form K So far as other interested persons are concerned, there is no provision imputing constructive knowledge of the award to them. With regard to them, therefore, the period of one year for filing a suit under section 29 will commence to run from the date when the award was communicated or was known by them either actually or constructively

Appeal against the Decree of the Court of the Subordinate Judge of Padmanabhapuram in Appeal Suit No 57 of 1961, preferred against the decree of the Court of the District Munsif of Kuzhithurai in O S. No 2 of 1958

T. R. Ramachandran, for Appellants.

P Anandhakrishna Nair, for Respondents.

The Court delivered the following

JUDGMENT —The legal representatives of the plaintiff are the appellants. The suit was filed for redemption of plaint ' A ' and B ' schedule properties. In this appeal we are not concerned with ' B ' schedule properties. The plaint ' A ' schedule properties originally belonged to one Padmanabha Pillai Madhavan Pillai of Vadavankara House He mortgaged the plaint ' A ' schedule properties to the father of defendants 1 to 3 and the grandfather of defendants 4 to 9. The plaintiff obtained a sub-mortgage of the properties on 21—1—1091 and was in enjoyment thereafter Padmanabha Pillai Madhavan Pillai executed an otti and kuzhikanam deed to the plaintiff under Exhibit A-3 on 5—9—1097, directing the plaintiff to redeem the mortgage of the year 1095 executed by the mortgagor in favour of defendants 1 to 3. On 12—3—1099 Padmanabha Pillai

*S.A No. 544 of 1962. 19th November, 1965.

Madhavan Pillai executed a melotti and kuzhikanam deed to defendants 1 to 3, the father of defendants 4 and 5 and the father of defendants 6 to 9, directing them to redeem the mortgage in respect of plaint 'A' schedule properties There was a partition in the family of Padmanabha Pillai Madhavan Pillai under Exhibit A-5 dated 20—4—1101, by which the properties mentioned in 'A' to 'F' schedules were divided. 1/8th share of the properties was allotted to 'E' schedule holders, Kali Lakshmi and her children Another 1/8th share was allotted to 'F' schedule holders, Gowari Pillai and her children. Under Exhibit A-6 dated 15—7—1104 'E' schedule holders partitioned their properties, and Chellappan Pillai became entitled to 'E' schedule properties. The plaintiff purchased 1/8th share of Chellappan Pillai under Exhibit A-7 dated 27—1—1117. He also purchased 1/8th share from 'F' schedule holders under Exhibit A-8 dated 22—12—1117, and thereby became the 1/4th owner of the rights under Exhibit A-4. The suit was filed for redemption of the mortgage properties from the defendants.

The defendants contended that they were the jenmis of the suit properties and that Padmanabha Pillai Madhavan Pillai and others sold the plaint properties to one Janaki Pillai and another, and the defendants obtained redemption of the properties under the decree in O S No. 1371 of 1103. The defendants further contended that the sale deeds in favour of the plaintiffs were invalid.

The trial Court found that the plaintiff had purchased 1/4th share from Padmanabha Pillai Madhavan Pillai's branch and was competent to redeem 'A' schedule items from defendants 1 to 9 and decreed the suit. During the trial an attempt was made by the defendants to produce Oodukoor awards regarding the properties but the trial Court declined the receive them, as the applications were belated.

The 2nd defendant preferred an appeal to the Subordinate Judge of Padmanabhapuram. He filed I A Nos 723 and 726 of 1960 for reception of Oodukoor awards as additional evidence. The Subordinate Judge received the documents as additional evidence and remanded the suit for fresh disposal after giving an opportunity to the defendants to prove the awards.

After remand, the trial Court accepted the plaintiff's claim over the plaint properties and found that the plaintiff was entitled to redeem the properties and that the defendants could not dispute the title of the plaintiff The trial Court also found that the defendants had not acquired the jenmon rights and that the plaintiffs' right to redeem subsisted. But the trial Court found that the Oodukoor award was binding on the plaintiff and as the plaintiff had failed to prefer a civil suit within one year from the date of the award, the award had become final. The plaintiff preferred an appeal to the Subordinate Judge. The Subordinate Judge confirmed all the findings of the trial Court and dismissed the suit The right of the plaintiff to 1/4th share in 'A' schedule properties and his right to redeem the properties are admitted in this appeal. Mr. T R. Ramachandran, learned Counsel for the appellants-plaintiffs, submitted that the Oodukoor award is not binding on the plaintiff and that in any event the Courts below were in error in holding that the suit was not within time.

Exhibit B-35 is the certified copy of the Oodukoor award and Exhibit B-36 is the plan appended to the award Exhibits B-35 and B-36 related to item 4 of 'A' schedule. The award was passed on 6th July, 1955 By the award the plaintiff is not given any share in the equity of redemption Exhibit B-14 is the copy of the award and Exhibits B-25 and B-26 and B-27 are certified copies of the plan prepared by Oodukoor office relating to items 2 and 3 of 'A' schedule The award was passed on 19th May, 1946 It is submitted that the present suit was filed more than one year after the date of the award.

Mr T R Ramachandran, learned Counsel, for the appellant, submitted that the Oodukoor award is not binding on the plaintiff, as he was not a party to the Oodukoor proceedings and that he had no notice of the proceedings at any stage. He contended that notice to the mortgagees of the Oodukoor proceedings will be of no consequence and will not bind his interests. He contended that the finality

of the award was only between the sharers, and the mortgagees in possession cannot deny the title of the sharers in spite of the award. He further questioned the validity of the award, as it is not sealed as required under rule 27 of the Oodukoor Settlement Rules. Finally, he submitted that under section 29 of the Travancore Oodukoor Settlement Proclamation the suit was within time, as it was filed within one year of the knowledge of the plaintiff of the award

The question as to the validity of the award due to the non-affixing of the seal to the award may be first dealt with. Section 24 of the proclamation provides that at the close of the settlement enquiry in respect of each Oodukoor holding the Settlement Officer shall pass an award settling the holdings among the various shareholders. Section 33 of the Travancore-Oodukoor Settlement Proclamation empowers the Government to make Rules to carry out all or any of the purposes of the Proclamation. It is further provided under this section that all Rules published as required by this section shall on such publication have effect as if enacted by the Proclamation The Rules, therefore, form part of the proclamation and have equal validity as the enactment itself, provided they are within the rule making powers. Rule 27 of the Oodukoor Settlement Rules is as follows .—

"The award besides containing the signature of the Settlement Officer shall also be affixed with his office seal "

The rule requires that the Settlement Officer shall not only sign the award but shall also affix his office seal It was contended by the learned Counsel for the appellant that the signing as well as sealing of the award are mandatory requirements and the failure to sign or seal would make the award inoperative and ineffective. As the validity of the award was questioned, notice was ordered to the Government Pleader and he was heard on this question.

The effect of the failure to affix the seal may now be considered If, for the very validity of the award the signing and sealing are necessary, the failure to sign or seal will make the award, inoperative But if signing and sealing are procedural requirements, the failure to sign and seal would not render the award ineffective. Section 24, which requires the Settlement Officer to pass an award, does not require the signing or sealing The essential duty of the Officer is to pass the award settling the holding among various holders after giving particulars requied under the section. Signing and sealing of the award are required under rule 27. The validity of the rule is not questioned as being beyond the scope of the rule making powers, as the rule only prescribes the mode of carrying out the purposes of the Proclamation. It cannot also be disputed that the rule has equal validity as the Proclamation, but the requirements of signing and sealing cannot be said to be a condition precedent before giving validity to the award The award is complete as soon as it is made and there is nothing in the Proclamation or in the Rules which invalidates the award, if it is not signed or sealed In *Firm Gokal Chand* v *Firm Nand Ram*[1], the Judicial Committee had to consider the validity of a judgment of Court, which was not signed Referring to Order 41, rule 31, Civil Procedure Code, which requires that the judgment shall be in writing and shall at the time it is pronounced be signed and dated by the Judge or by the Judges concurring therein, Their Lordships observed at page 295 as follows —

"The rule does not say that if its requirements are not complied with the judgment shall be a nullity. So startling a result would need clear and precise words . . . . The rule from its very nature is not intended to affect the rights of parties to a judgment It is intended to secure certainty in the ascertainment of what the judgment was . . . . . The defect is merely an irregularity "

Their Lordships also referred to sections 99 and 108, Civil Procedure Code. Section 99 provides that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. This decision is cited with approval by the Supreme Court in *Surendra*

1. L.R. 66 I.A. 12 . (1939) 1 M.L.J. 56.

Singh v *State of Uttar Pradesh*[1] It was contended that there was no provision in the Oodukoor Proclamation or Rules corresponding to section 99 or section 108, Civil Procedure Code, and therefore the defect could not be cured The Proclamation or the Rules do not provide that, if the requirements are not complied with, the award will be a nullity and, as stated by the Privy Council in *Firm Gokal Chand* v *Firm Nand Ram*[2], so startling a result would need clear and precise words. It has been held by this Court in *Dasaratha Rao* v. *Ramaswamy*[3], and *Johara Bibi* v. *Mohammad Sadak*[4], that the failure of one of the arbitrators to sign the award as required under section 14 (1) of the Arbitration Act, 1940 does not affect the validity of the award Section 14 of the Arbitration Act requires that, when the arbitrators have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof Though section 14 (1) requires that the arbitrators shall sign, it has been held that the failure to sign will not affect the validity of the award In English law also, though the award is required to be written signed and sealed, the failure to sign or seal will not have the effect of setting aside the award Reference was also made to similar provisions in the Indian Registration Act Section 60 of the the Indian Registration Act requires that the Registering Officer shall endorse thereon a certificate containing the word ' registered ' and shall sign, seal and date the certificate, which shall be admissible for the purpose of proving the document as having been duly registered. Section 87 of the Registration Act provides that no act done by the Registering Officer is good faith shall be deemed invalid merely by reason of any defect in his appointment or procedure Section 60 relates to the procedure on admitting to registration, and any defect in signing, sealing and endorsing the certificate would be a defect in procedure curable under section 87. Mr T R Ramachandran, learned Counsel for the appellant, submitted that the decisions rendered under the Registration Act holding that the failure of the Registering Officer to sign and seal as required under section 60 would not invalidate the document cannot be of much use in construing the validity of the award in question. I agree with the contention of the learned Counsel, for section 87 specifically cures any defect in procedure. Relying on the decision of the Privy Council in *Firm Gokal Chand* v. *Firm Nand Ram*[2], approved by the Supreme Court in *Surendra Singh* v *State of Uttar Pradesh*[1], I hold that the award is not vitiated by the failure of the Officer to affix his seal

It is admitted that the plaintiff was not a party to the Oodukoor proceedings and no notice was given to him There cannot be any doubt that notice to the mortgagees will not bind the plaintiff or in any way affect his rights The questions raised by the learned Counsel will have to be determined on an examination of the various sections of the Travancore Oodukoor Settlement Proclamation The Travancore-Oodukoor Settlement Proclamation of 1122 was made for the purpose of an early settlement of Oodukoor holdings, as the justification of the continuance of the Oodukoor system ceased to exist and the continuance of that system became a great impediment to the agricultural progress and prosperity of the State. The object of the Proclamation was to conduct a settlement of the Oodukoor holdings The Government was empowered to appoint Settlement Officers and Party Officers for the purpose of settling the claims relating to Oodukoor holdings in the State and were empowered to exercise all such powers and perform all such duties as may be laid down in the Proclamation and the Rules passed thereunder. Section 5 provided for preliminary notification for the Oodukoor holdings in the Government Gazette, and section 6 provided for notification by the Settlement Officer for starting the settlement work in a taluk by publication in the Government Gazette specifying the taluk in which the settlement work was proposed to be started and calling upon all persons interested in the Oodukoor holdings to appear and deliver to him a statement of their claim in respect of their Oodukoor holdings Section 7 authorised the preparation of a register of Oodukoor holdings by the Settlement Officer. Any person, who held a share in the Oodukoor holding and whose name was not

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1 (1954) S C J 12 (1954) 1 M L J 50
2 (1939) 1 M.L J 56 L R 66 I.A. 12
3 (1956) 2 M L J 693
4 (1951) 2 M L J 96

included in the register, was entitled to apply to the Party Officer for including the holding in the register. Section 8 provided that after the completion of the register under section 7 the Party Officer shall give notice in the prescribed form to every Oodukoor holder, whose name appeared in the register, requiring him to appear before the Party Officer and deliver a written statement Sections 9 and 10 provided the penalty for the failure of a party to appear and to put in his written statement as *ex parte* The word ' party ' would refer to an Oodukoor holder, whose name appeared in the register, as notice contemplated under section 8 is only to an Oodukoor holder, whose name appeared in the register But, section 10 provided penalty on all interested persons, who failed to appear or put in written statements. When any person having an interest in the Oodukoor holding failed to appear or put in any written statement within one month after service of notice in the manner referred to under section 8, the Party Officer was authorised to order that such holding shall be treated as a holding held on joint patta by the several shareholders. By section 6 the publication of the notice in the gazette is deemed to be sufficient notice to all persons interested. The term ' persons interested ' is defined as including all persons claiming any interest in or charge on an Oodukoor holding Thus, any person having interest is deemed to have had notice regarding the Settlement proceedings. Any person having a share is also given a right to move the officer for including his holding in the register under section 7 (2). Section 10 provides that, if any person interested in the Oodukoor holding fails to appear, the Officer may proceed with the settlement proceedings, though notice under section 8 is only for persons noted as Oodukoor holders in the register The result of the various sections is that, if a person having any interest failed to get his holding included in the register under section 7 (2), he cannot claim that notice should be served on him, and that, if he failed to take action within the time specified, in section 10, the Officer can proceed with the settlement proceedings. Sections 11 and 12 enumerate the powers of the Settlement Officer to settle the holding The award of the Settlement Officer is to be passed under section 24 of the Act The award, while settling the holding among the various shareholders, shall specify the extent and tenure of each subdivision in respect of lands for which tenures are retained, the name of the person to whom it is allotted, the encumbrance existing on each sub-division, the amount ordered to be paid by one shareholder to another in adjustment of the share value and such other particulars regarding each sub-division as may be prescribed Section 29 provides that the award passed by the Settlement Officer shall be final and binding on all the shareholders and other persons interested in the holding, unless it is cancelled or modified by the decree of a civil Court of competent jurisdiction in a suit instituted for the purpose within one year from the date of the award by any person interested in the holding Section 29 is wide enough to make the award binding on " other pesons interested in the holding " subject to getting the award modified in a suit instituted by them within one year from the date of the award, as the words 'persons interested' include all persons claiming interest in or charge on an Oodukoor holding In this case we are concerned with persons interested in a share in the Oodukoor holding and therefore the award is binding under section 29 In this case we are not concerned with the person holding a mortgage right over the Oodukoor holding. When any person interested fails to appear and put in a written statement as required under section 10, the Settlement Officer is entitled to proceed with his enquiry and pass an award as provided under section 24, and this award is binding on all persons interested. The validity of the award, therefore, cannot be questioned by any person interested. But a remedy is provided to a person interested, in that he can have the award cancelled or modified by a suit instituted in a civil Court within a year from the date of the award

The question is whether the suit should be filed within one year from the date of the award or from the date of knowledge of the award by the person interested. Rule 35, of the Oodukoor Settlement Rules provides that on passing of an award by the Settlement Officer a notice in Form K shall be issued to all the parties in the case intimating the purport of the decision. So far as parties to the case are concerned, the period will therefore run only from the date of receipt of the notice in Form K.

So far as others are concerned, it should be noted that the Proclamation or the Rules do not provide for any publication of the award or constructive notice to all persons concerned In the absence of any such provision deeming notice to all persons, interested persons can only be said to have notice from the date of their knowledge The Supreme Court in *Harish Chandra* v *Dy L A Officer*[1], dealing with the award by the Collector under the Land Acquisition Act held as follows at page 1504 :

> " The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression ' the date of the award ' used in the proviso must mean the date when the award is either communicated to the Party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words ' from the date of the Collector's award ' used in the proviso to section 18 in a literal or mechanical way "

As already stated, there is no provision imputing constructive knowledge of the award to the person interested Following the decision of the Supreme Court it has to be held that the words 'date of the award' in section 29 will have to be understood as the date when the award was communicated to the party or is known by him either actually or constructively In this case there is nothing to show that the plaintiff was aware of the passing of the award before he filed the suit, for the award itself was brought to the notice of the Court only at a late stage of the proceeding by the defendant The suit has therefore to be held to be within time.

As already stated, all other issues have been found in favour of the plaintiff and, as the suit is found to have been filed within time, the appeal will have to be allowed and the plaintiff's suit decreed with costs throughout

Leave refused.

V.K ——— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M ANANTANARAYANAN, *Officiating Chief Justice* AND MR JUSTICE P. RAMAKRISHNAN

Subbarama Reddiar .. *Appellant**

v.

Saraswathi Ammal .. *Respondent*

Civil Procedure Code (V of 1908), *section* 100—*Suit for judicial separation—Second appeal in—Interference with findings of fact*

Hindu Marriage Act (XXV of 1955), *sections* 10 (f) *and* 13—*Application for judicial separation on the ground of adultery—Proof of factum of adultery—Principle of law applicable to—English decisions—Value of*

The High Court in a Second Appeal arising from a suit for judicial separation has really no jurisdiction to proceed into a question of fact, (factum of adultery in the instant case), to reassess the evidence and come to any different conclusion even if it is of the view that the finding is erroneous Unless there is some error of law or application of law to facts, of a fundamental character, an interference in Second Appeal with the judgments of the Courts below will not be justified The question whether any principle of law can be said to arise in Second Appeal, can only be argued on the basis of facts as established by the record and as accepted by the trial Court and the first appellate Court

With regard to the matrimonial offence of adultery when alleged by one spouse against another as a ground for divorce or other relief the Court must be satisfied beyond reasonable doubt that adultery was committed, *i e*, the circumstances must be such as would lead the guarded discretion of a reasonable and just man to that conclusion But adultery can be very rarely if ever, be proved by the direct evidence of witnesses who saw the parties in *flagrante delicto* and witnessed that act In most cases, the evidence must be circumstantial in character. But the circumstances must satisfy the test that regarded together, they lead to an irresistible inference that adultery must have been committed The quasi-criminal character of the jurisdiction is not of particular importance except that there must be a high degree of proof which would make the guilt of the erring spouse certain to the mind of the Court But once these propositions are conceded the rest must clearly depend on the facts of each case Adultery can only be regarded as a question of fact

Indisputably adultery will have to be described, if not defined, as involving a voluntary act of sexual intercourse between the erring spouse and some other person Where the wife is merely the victim of rape or the intercourse takes place when she was stupefied by a drug, this would not amount

1. AIR 1961 S C. 1500

*L P A No 36 of 1956. 16th March, 1966.

to adultery But it is not the law that actual penetration should be proved The unwritten taboos and rules of social morality in this Country and particularly in village areas must necessarily be taken into account If an unrelated person is found alone with a young wife after midnight, in her bedroom in actual physical juxtaposition (as in the instant case), unless there is some explanation forthcoming for this, which is compatible with an innocent interpretation, the only interpretation that a Court of law can draw must be that the two were committing an act of adultery together

Though cases in England are very useful in this regard, apart from resorting to them for light upon the basic principles, they should not be utilised to any further degree or extent This is for the compelling reason that social conditions and the unwritten ethics of social conduct, in the two countries, may be widely different

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Venkatadri dated 18th September, 1964, and made in A A A. No 9 of 1964 preferred against the order of the District Court of Chingleput dated 29th July, 1963, and made in C M A No 64 of 1962 (O P No 119/59 on the file of the Court of the Principal Subordinate Judge of Chingleput)

V. Thiagarajan N. Sivamani, for Appellant

K. V. Sankaran and *K Ranganathan*, for Respondent

The Judgment of the Court was delivered by

M Anantanarayanan, O C J—This Letters Patent Appeal has been instituted by one Subbarama Reddiar, the respondent before Venkatadri, J, in C M S No. 9 of 1964, from the judgment and decree of the learned Judge We may very briefly state that the proceeding before the learned Judge was of the nature of a Second Appeal, in respect of a petition under section 10 (*f*) and section 13 of the Hindu Marriage Act (XXV of 1955), for a decree for judicial separation originally before the learned Principal Subordinate Judge of Chingleput

The learned Principal Subordinate Judge of Chingleput went into the facts of the evidence before him, elaborately on the merits, and held that the act of adultery alleged by the husband (appellant) against his wife Saraswathi Ammal (Respondent) on the occasion in question, was legally proved, and hence that the husband was entitled to a decree for judicial separation under section 10 (*f*) of the Hindu Marriage Act. The matter went up on appeal to the learned District Judge of Chingleput (C M A. No. 64 of 1962), and the learned District Judge of Chingleput confirmed the judgment of the Court below in first appeal, in a judgment of some length, which again proceeds to an analysis of the evidence There can be no doubt that the appeal against this order before the learned Judge (Venkatadri, J) was of the nature of a Second Appeal That was held by Kailasam, J in *Sathappa Chettiar* v *Ammaponnu*[1] and if we may say so with respect we have no doubt whatever that Kailasam, J. is correct in his view Though the proceeding before him was thus of the nature of Second Appeal and the jurisdiction of the learned Judge Venkatadri, J, was indisputably restricted by virtue of section 100, Civil Procedure Code, the learned Judge neverthless has differed from both the Courts below and allowed the Second Appeal after the citation of certain English decisions and a further analysis of the facts of evidence both with regard to the probabilities arising on that evidence and the credibility of the witnesses

Two main questions therefore arise before us for our determination. It is strenuously contended by learned Counsel for the appellant (Sri V Thyagarajan) that in view of the explicit and categorical decisions of the Supreme Court and of this Court to which we shall presently refer the learned Judge (Venkatadri, J) had really no jurisdiction to proceed into questions of fact to reassess the evidence and to come to any different conclusion If that is the situation at law the learned Counsel for the respondent is unable to contend that there is any authority for holding that the situation is different because the question of fact is the question of an act of adultery which has sometimes been characterised as a fact of quasi-criminal character and therefore requiring a high degree of proof The second question is apart from this question of the ambit of interference in Second Appeal whether there is any error of law or misapplication of the principles of law in the judgments

1. (1966) 1 M L J 102

of the Courts below, in their conclusion that the act of adultery was proved against the wife, which might conceivably justify *interference* with the decree by this Court in Second Appeal If both these questions are to be answered in favour of the appellant, it would inevitably follow that we must allow this appeal and reverse the decision of Venkatadri, J

As regards the first proposition, the matter is really not in doubt, and must be, regarded as set at rest by numerous decisions of the Supreme Court and of this Court of which it is sufficient to refer to the following.

In *Muthia Asari* v *Madasami Asari*[1], a Bench of this Court, of which one of us was a party, had occasion to discuss the same principle, and it was laid down that the High Court, in exercise of its jurisdiction with regard to Second Appeals, will have no power to interfere with an explicit finding of fact based on the appreciation of evidence even if the High Court be of the view that the finding is erroneous Another decision precisely to the same effect is *Motimul Sowcar* v *Visalakshi Ammal*[2], which was also a Bench decision to which one of us was a party. The principle has been stated in a slightly different from in this decision, that, except for the clearest and strongest of reasons, which could be held to tantamount to interference on a question of law, the High Court in Second Appeal will have no jurisdiction to convert itself into a Court of first appeal, and to reverse a concurrent finding of fact

These statements of the law are based upon authoritative decisions of the Supreme Court, such as the decision in *Sinha Ramanuja* v *Ranga Ramanuja*[3]. Delivering the judgment of the Court Subba Rao, J, observed that the High Court had no jurisdiction to entertain a Second Appeal on the ground of an erroneous finding of fact, however gross the error may be It will be noticed that their Lordships have enunciated the inhibiting principle, in even stronger terms than have been used in the two decision of this Court that have been referred to

In *Pattabhiramaswamy* v *Hanymayya*[4], the same bar of jurisdiction has been laid down, referring to the provisions of section 100, Civil Procedure Code and to the dicta of the Judicial Committee in the very early case *Durga Chowdhrani* v *Jawahir Singh*[5]. Therefore, unless the reversing judgment of the learned Judge can be sustained as a judgment based upon the discovery of some error of law, or misapplication of law to facts, of a fundamental character, in the judgments of the Courts below, the reversal cannot be legally sustained. We do not think that this is really in doubt What was argued before us, on the contrary, was that the perspective of approach of the lower Courts to the entire question was so erroneous that it can be maintained that the interference by this Court in Second Appeal was justified, upon a ground of law

Before proceeding into this aspect, which necessarily involves a discussion of the facts of evidence, and the scope of the record we may refer to the several decisions discussed by the learned Judge (Venkatadri, J) in his judgment, as laying down the true principles of law applicable to proof of the factum of adultery, where this is alleged by one spouse against another as a matrimonial offence In *Varadarajulu Naidu* v. *Baby Ammal*[6], Venkatadri, J, himself held that, in divorce cases on the ground of adultery, Courts can act even upon uncorroborated testimony and grant relief, taking the surrounding circumstances into consideration In that judgment as in the present judgment, the learned Judge referred to the dicta of Sir William Scott in *Lovedon* v *Lovedon*[7] He also referred to the observation of Coleridge, J., in *Riches* v *Riches*[8], and the dicta of Denning, L J, in *Miller* v *Minister of Pensions*[9] In the judgment under appeal, the learned Judge referred to certain other decisions and they include *Rose* v *Rose*[10], *Gower* v *Gower*[11], *Preston Jones* v *Preston Jones*[12], and the decisions of the Supreme Court in *Earnest John White* v. *Kathaleen Olive White*[13]

1 (1965) 2 M L J 220
2 (1965) 2 M L J 371.
3. (1962) 1 S C J 17 (1962) 1 M.L J (S C)
1 (1962) 1 An W R (S C) 1
4. A I R 1959 S C 57
5 L R 17 I A 122 P C
6 (1964) 2 M L J 187
7 (1810) 2 Hag Rep 1
8 35 T L R 141
9 (1947) 2 All E R 372
10 L R (1930) A C 1
11 (1950) 1 All E R 804
12 (1951) 1 All E R 124
13 1958 S C J 839 (1958) 2 M.L J (S C) 125 (1958) 2 An W R (S C) 125: 1958 M L J (Crl) 631

As far as the decision of the Supreme Court in concerned, that we may immediately deal with. We might observe that that was a proceeding under section 56 of the Indian Divorce Act (IV of 1869), and it related to the interpretation of sections 7 and 14 of the Divorce Act, the dictum stemming from the English precedents was here given recognition that, with regard to the matrimonial offence of adultery, when alleged by one spouse against another as a ground for divorce or other relief, the Court must be satisfied beyond reasonable doubt that adultery was committed. It will be noted that, though the principle has been set forth in differing forms in various decisions, very little can be added to the early statement of Sir William Scott in *Lovedon* v. *Lovedon*[1], " that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion ", namely, proof of the fact. At the same time, certain refinements have also to be taken note of It has been recognised in a catena of decisions that do not require separate analysis here, since the matter is beyond doubt, that adultery can very rarely, if ever, be proved by the direct evidence of witnesses who saw the parties *in flagrante delicto* and witnessed the act In most cases, the evidence must be circumstantial in character and must depend upon the situation spoken to in regard to which the act in alleged, and the probabilities relating to that situation But they (the circumstances) must satisfy the test that, regarded together, they lead to an irresistable inference that adultery must have been committed Another refinement is that noted by Denning L.J, in *Miller* v *Minister of Pensions*[2], that proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The quasi-criminal character of the jurisdiction, that has sometimes been referred to, is not of particular importance, except that we have to note that there must be a high degree of proof which would make the guilt of the erring spouse certain to the mind of the Court judging evidence of the offence. But once these propositions are conceded, the rest must clearly depend on the facts of each individual case. As in the practice of the Courts in England, here also adultery can only be regarded as a question of fact depending on the cumulative view of the evidence, if there were a jury trial, it would be a question of fact to be put to the jury by the addressing Judge, after enunciating the relevant legal principles Venkatadri, J, had himself laid down that there is no rule of law that the fact cannot be proved upon the uncorroborated testimony of one witness. This is of very little significance here for, in the present case, we certainly have corroboration and we have considerable evidence about the situation in which the act of adultery is said to have occurred.

Before proceeding to a conspectus of the evidence, we desire to add one more observation The cases in England are very useful in this regard, as our Courts have affirmed to principles laid down in several English decisions, stemming from the 19th century Moreover, our own Act does follow, in a large measure, the provisions of the English Act But apart from proceeding to the English decisions for light upon the basic principles, we are afraid that these cannot be and should not be utilised to any further degree or extent. This is for the compelling reasons that social conditions, and the unwritten ethics of social conduct, in the two countries, may be so widely different. The behaviour between the sexes, in particular and the norms that apply to such behaviour, will differ markedly from culture to culture and nation to nation A degree of familiarity that may be totally innocent in one country, or permitted by custom, may be so condemned by social taboos in another, that the occurrence of such incidents of familiarity will be compatible only with an inference of infidelity In other words, there is no sphere in which it is more unsafe to draw generalisations from the facts of judicial precedents in quite different countries such as India and England, than the sphere of social relationships and morals as impinging on the law of marriage and divorce

Having said all this, we may now proceed to a very brief conspectus of the evidence in the case As we stated earlier, there is quite a volume of testimony about the particular incident upon which the husband relied for proof of adultery. According to him, there was a ceremony (*karumadi*) at Chekamjeri village that even

1 (1810) 2 Hag Rep. 1 2 (1947) 2 All E R 372.

ing and he proceeded there at 6 P M. and came back to his house at midnight, or sometime thereafter. We have been referred to discrepancies in the times furnished by various witnesses, but in our view, they are eminently natural to testimonies of persons in rural areas, and of little consequence The husband (P W. 1) came and found an old lady Sayamma (P W 2) in front of his house, outside When he pushed the door and went into the bedroom, he saw his wife, the respondent and one Ramanathan " lying one over the other ". He raised cries of distress and alarm, and caught hold of the intruder Ramanathan. Hearing the shouts, Sayammal (P W 2) came there, and also raised cries and caught hold of the husband the petitioner probably being afraid that he would stab the other man. In this disturbance, Ramanathan succeeded in escaping. Naturally enough, there was considerable shouting and altercation and a crowd very soon gathered, including two witnesses who seem quite disinterested, namely, Mohana Ranga Naidu (P.W 3) and Bodi Naidu (P W. 4). It is important to note that, according to the witnesses the wife (respondent) gave no answer whatever to questions about what had happened, and how the incident had occurred. The parents of the wife were then sent for, and P W 1 was weeping at the spot His parents also came, and after a little talk the girl was taken away That was the last time when P W 1 was with his wife, and there was no subsequent reunion or condonation, before the proceeding for judicial separation.

P W. 1 is corroborated by Sayammal (P W. 2) Mohana Ranga Naidu (P.W 3) and Bodi Naidu (P W 4). Indisputably even P.W 2 does not state that she saw Ramanathan and the respondent lying one over the other ; that part of the evidence of P.W. 1 is uncorroborated. But she states that she heard the cries, and went in and saw the husband (Petitioner) and Ramanathan engaged in a scuffle. She caught hold of the husband and Ramanathan escaped. The evidence of P W. 3 is along the same lines, though he came a little later. The evidence of P.W 4 is important, for that contains some *res gestea* evidence about what the husband (petitioner) said, which is significant According to P W.4, P.W 1 told him that he returned late at night and saw Ramanathan in the house and caught hold of him, and then P.W. 2 came and caught hold of P W. 1, when Ramanathan escaped We do not think that we would be justified in proceeding into a discussion of the several opposing grounds of probability and improbability that were apparently canvassed before the learned Judge (Venkatadri, J) arising from this evidence, and which have also been canvassed before us We think it is sufficient to record our conclusion that, as far as the merits are concerned the trial Court and the first appellate Court went carefully into this evidence, considered the counter-testimonies of the wife (respondent) and her parents, and accepted the evidence of P Ws 1 to 4 as the truth. In our view, these findings are undoubtedly binding on this Court in Second Appeal and this Court has no jurisdiction to reassess the evidence, and come to any other conclusion, even if a learned Judge of this Court thinks that the evidence ought to be appreciated differently or that some part of the testimony ought not to be believed The question whether any principle of law can be said to arise in Second Appeal, can only be argued on the basis of facts as established by the record, and as accepted by the trial Court and the first appellate Court.

Regarded in this light, there are only two arguments that would appear to merit further discussion at our hands The first is an argument put forward by the learned Counsel for the respondent, but not referred to by the learned Judge. It is that the conclusion of the trial Court, and even the conclusion of the first appellate Court are not couched in such explicit terms as to lead to an inference that those Courts thought that the fact of adultery had been established beyond reasonable doubt. In particular, reference is made to one observation of the trial Court, that the evidence about adulterous intercourse was very flimsy, and depended entirely on the interested testimony of P W 1 and the corroborative testimony of P W. 2 etc. We do not think that we would be justified in taking a stray observation from the judgment of the trial Court, and basing any power of interference upon that as involving a principle of law. The judgments of the two Courts are clear and explicit that on the evidence, they found the fact of adultery proved to their satisfaction be-

yond reasonable doubt. Nor can it be doubted that, if the evidence is to be accepted in its details, it would induce any reasonable person to come to only one conclusion, that the respondent had adulterous intercourse with Ramanathan, on the occasion in question.

The other ground of law is that referred to by the learned Judge—the learned Judge has indicated that certain authorities may be the sources for such a view. The learned Judge points out that the evidence of the petitioner did not show that Ramanathan was naked, when the petitioner saw him, or in a state of partial undress. Nor did the petitioner state that the wife (respondent) had exposed her body, or that he found her with her body exposed. The learned Judge then adds .

> "The evidence of the husband that he saw Ramanathan lying over his wife would not show that she made a surrender of her body, her mind and everything"

It is argued that this is a question of law, since adulterous intercourse has to be proved as a fact, and a mere attempt at sexual intercourse will not amount to an act of adultery

With great respect to the learned Judge we are unable to follow him in the observation that we have extracted and set forth above. Indisputably, adultery will have to be described, if not defined, as involving a voluntary act of sexual intercourse between the erring spouse and some other person We have no doubt that where the wife is merely the victim of rape, or the intercourse takes place when she was stupefied by a drug, this would not amount to adultery But the logical fallacy, if we may say so, in the perspective of approach discussed by the learned Judge is that while the law requires that adultery should be proved beyond reasonable doubt, it equally recognises that this cannot be by direct evidence in most cases but must be by circumstantial evidence If we follow the learned Judge rightly, he appears to think that actual penetration should be proved for proof of adultery This can only be by direct evidence, and it would mean that unless the erring spouse and the third party were caught in the actual act in *flagrante delicto* proof of adultery would be impossible. That is not the law, and we have no reason to think that it is, since numerous decisions have recognised that proof of adultery by direct evidence cannot be expected, in most cases The point is, what is the inference to be drawn from the evidence in the record, if we accept that evidence at face value? We think that only one inference is possible and that only one inference can be drawn by any reasonable person, namely, that the respondent and Ramanathan did commit the act of adultery together on that occasion. It is in this context that we must emphasise that the unwritten taboos and rules of social morality in this country and particularly in village areas must necessarily be taken into account If an unrelated person is found alone with a young wife after midnight, in her bedroom, in an actual physical juxtaposition unless there is some explanation forthcoming for this which is compatiable with an innocent interpretation, the only interpretation that a Court of law can draw must be that the two were committing an act of adultery together. We do not think that this need be dilated upon further In any view, it is not a question of law, it is a question of fact, which would be left to the jury in any proceeding for divorce in the United Kingdom Even if the learned Judge (Venkatadri, J), was unable to agree, he really had no jurisdiction to reverse the finding in a Second Appeal.

In the light of the above analysis, we allow the Letters Patent Appeal, set aside the decree of Venkatadri, J and restore the decree for judicial separation granted by the trial Court We also direct, under section 25 of the Hindu Marriage Act (XXV of 1955), that the husband do pay the wife alimony of Rs. 35 per mensem awarded by the Courts originally till such time as she becomes disentitled to it by any second marriage The parties will bear their own costs.

V K. *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI

M/s. Sanjeevi & Co., Madras .. *Applicant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Deduction—Jurisdiction of Revenue—Amount, if actually expended or laid out—If wholly and exclusively for the purpose of the business—Findings to be recorded by Revenue—Reasonableness of expenditure—Not a matter for the Revenue—Assessee, a dealer—Payment of brokerage commission to agents under an agreement—Claim for deduction as business expenditure—Finding to be given on investigation of materials

The assessee-firm, carrying on business as a dealer in edible oils and as a distributor of certain products of a company, under an agreement with its agents, paid brokerage to the agents calculated at forty per cent of its profits and claimed the amounts as a deduction under section 10 (2) (*xv*) as business expenditure The Tribunal confirmed the appellate order disallowing part of the brokerage as being excessive Neither the Tribunal nor the Appellate Assistant Commissioner recorded a finding that the remuneration as stipulated in the agreement was not paid or that the payment was not incurred exclusively and wholly for the purpose of the business On a reference at the instance of the assessee, under section 66 (2) of the Act

Held, that the jurisdiction of the Revenue under section 10 (2) (*xv*) of the Act is confined to deciding the reality of the expenditure, namely, whether the amount claimed by way of deduction was factually expended or laid out, and whether it was wholly and exclusively for the purpose of the business Once that conclusion is reached in favour of the assessee, deduction of the amount should follow as a matter of course It is not for the Revenue to embark upon business considerations and the reasonableness or otherwise of the quantum of expenditure It is the duty of the Revenue in considering the question under section 10 (2) (*xv*) to investigate the materials and give a finding

On the facts, a proper disposal of the appeal would have been for the Tribunal to find the factum of the agreement with the agents, whether payment of commission as claimed by the assessee was true, and whether payment of commission to agents was an expenditure incurred by the assessee wholly and exclusively for the purpose of the business.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (2) of the Indian Income-tax Act, 1922 in R A. No. 183 of 1962-63.

K. C Jacob, for Applicant

K. R. Ramamani for *V. Balasubramanyam*, for Respondent

The Judgment of the Court was delivered by

Veeraswami, J—This reference relates to the assessment year 1960-61 corresponding to the accounting year ended on 31st March, 1960 The assessee is a firm of partnership carrying on business as a dealer in certain edible articles and also acts as a distributor for the products of the Margarine and Refined Oils Company (Private) Limited, Bangalore, for which it is remunerated by payment of commission. For the assessment year, the assessee returned a total income of Rs. 34,042 after deducting Rs. 20,199 as expenditure incurred by way of payment of brokerage The claim for deduction was disallowed by the assessing authority, but allowed in part on appeal. The Appellate Assistant Commissioner considered that the brokerage claimed as having been paid worked out at 40 per cent. of the profit, and as, in his view, this was excessive, he fixed a remuneration of Rs. 300 per month to each of the four agents and disallowed the excess The assessee took the matter on further appeal to the Tribunal but unsuccessfully. In the circumstances the following question has been referred to us under section 66 (2) of the Income-tax Act, 1922 :

"Whether on the facts and in the circumstances of this case, the disallowance of Rs. 5,799 being part of the remuneration by way of commission paid to the four employees of the concern is justified."

It is nobody's case that the four persons were employees of the concern. Apparently, the mistake has crept into the question on the assumption that they were employees. We shall proceed to consider the question regarding the four persons as agents and not as employees. Under section 10 (2) (*xv*) the assessee is entitled to deduction of any amount expended by him wholly and exclusively for the purpose

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*T.C No. 176 of 1963 13th December, 1965.

of the business Once the reality of the expenditure for that purpose is accepted, no further question can arise, and the assessee will be, as a matter of right, entitled to deduction of the amount expended for that purpose. It is not for the Revenue to embark upon business considerations and the reasonableness or otherwise of the quantum of expenditure It is of course open to the Revenue in finding the reality of the expenditure and the purpose for which it is incurred, to go into the facts and see whether at all the amount claimed was expended and for the purpose of the business. In fact, it is the duty of the Revenue, when the assessee claims deduction under that provision, to investigate the material and give a finding Even if they failed to give a finding, it should be taken that they accepted the reality of the expenditure and the purpose for which it is given, when in point of fact, they allowed a part and disallowed the rest of the claim. In other words, the jurisdiction of the Revenue under section 10 (2) (xv) is confined to deciding the reality of the expenditure, namely, whether the amount claimed for deduction was factually expended or laid out, and whether it was wholly and exclusively for the purpose of the business. Once that conclusion is reached in favour of the assessee, deduction of the amount should follow as a matter of course.

This Court in *Newton Studios* v. *The Commissioner of Income-tax, Madras*,[1] observed with reference to section 10 (2) (*xv*) :

"The Income-tax Act does not clothe the taxing authority with any power or jurisdiction to determine the reasonableness of the amount so fixed and paid by the assessee The only test for the deductibility of such remuneration is whether the expenditure has been incurred solely and exclusively for the purpose of the business If the reality of the payment is challenged or is in dispute-different considerations arise, so also in cases where the tax authorities are able to point to some consideration other than the purpose of the business as accounting for any portion of the payment made"

We respectfully agree with these observations. The two relevant facts for the purpose of deduction under section 10 (2) (*xv*) are the reality of the expenditure and the purpose for which it is expended. The reasonableness of the expenditure can only be gone into for the purpose of determining whether in fact the amount was spent. For instance, in this case, the Revenue could well have found that it was not 40 per cent. of the total profit that was expended but only less In the absence of such a finding or when it is found that the 40 per cent. of the profit was incurred for the purpose of the business, there is no alternative for the Revenue but to give deduction of the entire amount.

In this case, as we said, the Income-tax Officer disallowed the expenditure *in toto*. But the Appellate Assistant Commissioner allowed in part. In the years prior to the accounting year, the agreement for payment of remuneration to the agents would appear to have been oral. But somewhere in November, 1959, an agreement was entered into in writing as to the payment of remuneration. The four agencies are described, two of them as agency for canvassing purchasers of certain articles, and the rest as agency for packing and the agency for delivery. The terms of agreement between the assessee and the agents are that the firm was to provide them with work and payment of remuneration was to be at the rate of one anna six pies per article sold in the firm Neither the Tribunal nor the Appellate Assistant Commissioner recorded a finding that the remuneration as stipulated in the agreement was not paid or that the payment was not incurred exclusively and wholly for the purpose of the business The disallowance in part by the Appellate Assistant Commissioner was on the basis that in his view the payment of 40 per cent. of the profits as commission was rather excessive That as we said, is not a permissible reasoning, if the reality of the expenditure and the purpose for which it is incurred are accepted The Tribunal merely accepted that reasoning

In our view, a proper disposal of the appeal would have been for the Tribunal to find whether the agreement of agency with each of the four persons was a fact, whether payment of commission to each of them as claimed by the assessee was true, and whether payment of commission to the four persons was an expenditure

1. (1955) 2 M.L J 514.

incurred by the assessee wholly and exclusively for the purpose of the business. If these points are found in favour of the assessee, no further question can arise as to reasonableness or otherwsie of the quantum of the commission paid, for it is entirely for the assessee to decide it.

We answer the question referred to us in favour of the assessee, but in the expectation that the Tribunal will dispose of the appeal afresh in the light of the observations contained in this judgment No costs.

V.S. *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction).

PRESENT.—MR. JUSTICE P. S. KAILASAM

In the matter of the Companies Act, 1956 *and In the matter of Manasuba & Co, (P), Ltd. (In Liquidation)*

The Official Liquidator, Madras *Applicant* *

v.

C. V. Raman and three others *Respondents.*

Companies Act (I of 1956), *sections* 455, 478—*Public Examination—Directors of company—Official Liquidator—Report*—Prima facie *case of fraud jointly by directors—Individual acts of fraud, need not be specified—Order for public examination—Fraud by any officer in relation to the company—Act need not relate to promotion or formation of company—In relation to company—Comprehends fraud in regard to strangers—Public examination—No bar of constitutional protection to testimonial compulsion.*

The report of the Official Liquidator made under section 455 (2) of the Companies Act contained allegations of fraud as follows, the company borrowed large sums of money without any apparent justification, was grossly negligent in executing contracts and supplying sub-standard materials, borrowed large amounts from banks on the foot of forged documents and the company borrowed by discounting bills containing forged signatures of the directors The report did not contain any specific act of fraud against some directors On the question of a public examination of the directors on the basis of the report of the Official Liquidator

Held, that the report under section 455 (2) should be of a such a nature that will probabilise the opinion of the Official Liquidator that *prima facie* all the directors were concerned in the fraud. If it is made out on the facts that all the directors were jointly concerned in the fraud, it may not be necessary for the Official Liquidator to go further and state which of the directors committed a particular fraud

The fraud that is referred to in section 455 (2) as well as section 478 of the Act also covers the fraud 'by any officer of the company in relation to the company' In the case of the officers, the fraud need not relate to promotion or forrmation of the company It is sufficient if it is in relation to the company, since its formation The acts of fraud committed in relation to strangers is also within the expression 'in relation to the company'

Public examination under the provisions of the Act would not amount to accusation and is not prohibited under Article 20 (3) of the Constitution of India

Held on facts, as no specified acts of fraud are attributed to some of the directors, no public examination can be directed to be made against them Their drawing salaries would not show that they were privies to the fraud So also the negligence attributed to the company of large borrowings and not properly supervising the various contracts would not show that they were in any way concerned with the fraud

Application by Official Liquidator under sections 455 and 478 of Companies Act, 1956.

Official Liquidator, in Person

G N. Chary, for Respondent No. 1

M. S. Venkatarama Ayyar, for Respondent No. 2

T. B Balagopal and *K. S. Sankara Ayyar,* for Respondents Nos. 2 to 4.

The Court made the following

ORDER.—This application is taken out by the Official Liquidator, Madras High Court, the Official Liquidator of Manasuba & Company (P), Limited under sections 455 and 478 of the Companies Act, 1956 for directing the public examination

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* Company Application No. 233 of 1965 24th February, 1966
in C P. No 21 of 1951

of the three directors, namely, C. V Raman, T. V Narayanaswami Aiyar and T K. Balasubramaniam, and the Secretary of the Company, R S. Rangarajan.

The company, Manasuba & Company (Private) Limited, was incorporated on 13th May, 1957, under the Companies Act, 1956 as a private limited company It ceased to do business as from 21st May, 1961 It was ordered to be wound up. A preliminary report under section 455 of the Companies Act was filed on 17th December, 1962, by the Official Liquidator and was ordered by this Court on 25th January, 1963 The Official Liquidator filed a further report under section 455 (2) stating that fraud had been committed in the conduct of the business of the company and that a public examination of the persons mentioned above should be conducted.

The three persons C. V Raman, T. V Narayanaswami Aiyar and T K Balasubramaniam, and one T N Nagarajan, were the promoter-directors of the company Nagarajan subsequently resigned his post as director. C V. Raman was appointed Managing Director of the Company in charge of all business by a resolution of the company dated 24th September, 1957, and was paid a sum of Rs. 550 per month from 1st September, 1957, as salary for managing the company's affairs. Narayanaswami Aiyar, who was another promoter-director of the company, was paid Rs 325 per month as salary for advising the company in the matter of providing finances for various works, contracts etc His salary was increased to Rs. 550 per month with effect from 1st June, 1958 He acted as Chairman at the meetings of the Board of Directors at all material times Balasubramaniam was also a promoter-director of the company, and by a resolution of the Board dated 6th October, 1958, he was being paid Rs 500 per month with effect from 1st May, 1958, for looking after the agency work and canvassing for various agencies and for looking after the other interests of the Company Rangarajan was appointed Secretary of the company by a resolution of the Board dated 13th May, 1957, and was authorised to carry on the day to day affairs of the company taking instructions from any of the directors.

The company entered into several contracts for construction of buildings and quarters as well as supply of building and road materials to the Neyveli Lignite Corporation and the Integral Coach Factory and supplies to the Madras Port Trust, etc As the undertakings by the Company involved huge expenditure, it was provided in the Articles of Association that the Directors may raise or borrow monies. The Directors by resolutions permitted the Managing Director to do various acts and subsequently ratified those acts of the Managing Director. The company passed various resolutions for borrowing moneys from several banks like the Bank of Baroda, Pandyan Bank, Indian Bank, etc In pursuance of those resolutions large amounts were borrowed.

Apart from those borrowings the company indulged in several transactions which are not permissible in law The company purchased two cars and twenty-one lorries. The company had paid the full price only for a few of these vehicles With regard to the other vehicles, the company would appear to have paid only small amounts by way of advance and the balance was paid by borrowing from certain financing firms and Multani money-lenders, by executing hypothecation deeds in favour of the Banks and hire purchase agreements in favour of the financing firms and the individual financiers.

The company also borrowed from banks by discounting bills for supply of materials to public concerns like Neyveli Lignite Corporation, the Integral Coach Factory, Madras Port Trust, etc It was found that several of the documents connected with the borrowings from several banks appeared to be not genuine and contained forged signatures of the directors The affairs of the company also disclosed that the company was negligent in fulfilling its contracts Due to lack of proper supervision several undertakings were not satisfactorily carried out and various supplies effected by the company were found to be of sub-standard As a result the institutions concerned preferred counter claims.

Section 455 (2) of the Companies Act, 1956, runs as follows :

"The Official Liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was promoted or formed and whether in his opinion,

any fraud has been committed by any person in its promotion or formation, or by any officer of the company in relation to the company since the formation thereof, and any other matters which, in his opinion, it is desirable to bring to the notice of the Court "

On receiving such a report the Court is empowered to proceed under section 478 of the Act, which is as follows :

" When an order has been made for winding up a company by the Court, and the Official Liquidator has made a report to the Court under this Act, stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation, the Court may, after considering the report, direct that that person or officer shall attend before the Court on a day appointed by it for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as an officer thereof "

Section 455 (2) and 478, together prescribe the circumstances in which a public examination can be conducted Under section 455 (2) the Official Liquidator shall make a further report stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since the formation thereof. The fraud contemplated must be by a person in the promotion or formation of a company or by any officer of the company in relation to the company. Section 478 empowers the Court, when it is satisfied that a fraud has been committed by a person in the promotion or formation of the company or by any officer of the company in relation to the company in its formation, to direct that person or officer to be publicly examined Before a public examination could be directed against any person, that a person in the opinion of the Official Liquidator should have committed a fraud. That fraud should have been in the promotion or formation of the company or by any officer of the company in relation to the company, since its formation In this application two contentions are raised by the learned Counsel appearing for respondents 2, 3 and 4 It is submitted that the fraud, if any, does not relate to the promotion or formation of the company or by any officer of the company in relation to the company, and that in any event the report of the Official Liquidator does not disclose that respondents 2, 3 and 4 were in any way concerned with the fraud. The question whether the report of the Official Liquidator discloses any fraud against respondents 2, 3 and 4 which will make them liable for being publicly examined, may be taken up first.

The fraud alleged in the report may be summed up as follows :

(*a*) The company borrowed large sums of money without any apparent justification,

(*b*) The company was also grossly negligent in executing serval contracts and supplying several sub-standard materials,

(*c*) The company borrowed large amounts from banks, financing firms and individual financiers on executing hypothecation deeds or hire purchase agreements, it is found on examination that the moneys had been raised on one and the same vehicle from several financiers without the knowledge of the prior encumbrancers of the said vehicle; the borrowings were effected on production of documents which were forged and not genuine ,

(*d*) The company borrowed by discounting bills for supply of materials to public concerns like the Neyveli Lignite Corporation, Integral Coach Factory, Madras Port Trust etc. Some of the documents connected with the borrowings from the several banks appear to be not genuine and contain forged signatures of the directors.

It is admitted that the 1st respondent, C. V Raman, was the Managing Director and was put in charge of all business and was Managing the company's affairs. The 2nd respondent was paid a salary of Rs 550 from 1st June, 1958, and was the Chairman at the meetings of the Board of Directors The 3rd respondent was also receiving a salary of Rs. 500 per month from 1st May, 1958, and was looking after the various works and was convassing for various agencies. The 4th respondent who was the Secretary of the company, was authorised to carry on the day to day affairs of the company. It is common ground that the company passed various resolutions, for taking loans from the banks, and several loans were obtained in

pursuance of the resolutions. These resolutions and the borrowings were ratified by all the Directors The plea of respondents 2, 3 and 4 is that the entire management of the company was in the hands of the 1st respondent, the Managing Director, and that they were not aware of the real affairs of the company and that all the illegal acts were committed by the Managing Directors without their knowledge.

That a fraud was committed in the affairs of the company does not admit of any doubt The report of the Official Liquidator discloses that loans had been obtained from various financiers by pledging the same vehicle again without the subsequent encumbrancers knowing that the vehicle had already been pledged. It can also admit of no doubt that various spurious bills purporting to be payable by public concerns like Neyveli Lignite Corporation, the Integral Coach Factory, Madras Port Trust etc., were produced before the banks and loans obtained. The report of the Official Liquidator clearly justifies his opinion that a fraud had been committed in the affairs of the company and that the 1st respondent was mainly responsible for it. But so far as respondents 2, 3 and 4 are concerned, it has to be considered whether there is any material for coming to the conclusion that they were parties to the fraud. No specific act of fraud is alleged by the Official Liquidator against respondents 2, 3 and 4 The Official Liquidator has stated in his report as follows :

"It is also a matter for investigation as to how far the Directors would be individually liable for the loss and the failure of the business . It is submitted that the couduct of the Managing Director was fraudulent and that of the other directors was, at any rate, grossly negligent and they acted contrary to their duty as Directors of the company Even if it were to be assumed they had not directly participated in the Managing Director's fraudulent acts, they would be liable to reimburse the company for the loss caused thereby they have failed to perform their duty to the company and committed misfeasance in permitting the Managing Directors, either willingly or negligently to commit the aforesaid acts The other directors should have been aware that the Managing Directors was acting improperly and in excess of his authority

In the conclusion of the report the Official Liquidator has expressed his opinion that fraud has been committed in the conduct of the business of the company. He has not stated that in his opinion respondents, 2, 3 and 4 were in any way concerned with the fraud It was submitted that it was unnecessary for the Official Liquidator to state in his report the case against each of the persons and that it was sufficient if it was clear from the facts disclosed that respondents 2, 3 and 4 were jointly responsible for the fraud.

The question as to the liability for being publicly examined has been considered in several decisions and they may be referred to The leading case on the subject is that of the House of Lords reported in Ex parte *Barnes*[1] In considering the jurisdiction of the Court to direct the public examination of a person under section 8, sub-section (3) of the Companies (Winding-up) Act, which is similar to the provisions of sections 455 (2) and 478 of the Companies Act, Lord Halsbury, L C., observed as follows :

"If all these provisions have reference to a person who is incriminated by the report, and who is brought there in the position of a person against whom a suggestion is made that he has been guilty of fraud, the whole system, the whole Code thereby created, is intelligible and rational, and one can understand what the meaning of each part of it is ; . .But if because a preliminary case has been made against *A*, as being guilty of fraud—if because *A* has been in that sense incriminated by the Official Receiver, *B* can be summoned and made subject to all these consequences, although no preliminary charge of fraud has been made against him at all, the whole thing becomes irrational and unintelligible "

The learned Judge further observed :

" In the event of there being no fraud found, or in the event of there being no individual pointed out as being suggested to be guilty of fraud, I entertain no doubt that the Court has no jurisdiction to make any such order for a public examination . and, inasmuch as it is directed to that person and that person alone it seems to me that it follows as essential to the jurisdiction of the Court that there should be a preliminary finding, which is the foundation of that jurisdiction, namely, that fraud has been committed by the individual person who is pointed out by the report "

In In re *Civil Naval and Military Outfitters Limited*[2], it was held following the decision in Ex parte *Barnes*[1] that there must be a report stating the manner in which the company was formed and whether in the opinion of the Official Receiver fraud

1. L.R. (1896) A.C. 146. 2. L.R. (1899) 1 Ch. D. 232, 233.

had been committed by the person whom he had proposed to examine. Regarding the report of the Official Receiver the Court observed that it was not meant to be an indictment or a statement of claim to charge a man with fraud and that the object of the report was to raise a *prima facie* case of fraud not a case which a man had to answer finally, but a case upon which a Judge had to decide whether he was to undergo a public examination

The Privy Council in *Tejani* v *Official Receiver*[1], considered the question whether fraud should be attributed to each of the respondents It was contended in that case that a *prima facie* case must be made out before any public examination could be held and that the Official Receiver's report must attribute to each of several persons ordered to attend some particular piece of alleged fraud. The Privy Council held at page 431 as follows :—

"The need for a *prima facie* case must surely be satisfied by a *prima facie* case of the highly qualified kind which was regarded as sufficient by Lindley, M R , in re *Civil, Naval and Military Outfitters, Limited*[2] "

Regarding the attribution of particular pieces of alleged fraud to particular individuals, the Privy Council observed :

" This appears to their Lordships to compel the conclusion that if a company with, say, three directors was carrying on some business in a fraudulent manner, none of the directors could be brought to book unless he or they chose to tell the Official Receiver which of the three directors had been the actual perpetrator or perpetrators of any of the fraudulent acts in question This would be a *reductio ad absurdum* which their Lordships find impossible of acceptance "

Strong reliance was placed on this observation by the Official Liquidator, who contends that the report cannot be expected to disclose which of the directors were the actual perpetrators of the fraudulent act in question. The above observation cannot be read as supporting the contention that, if it is proved that a fraud has been committed in the affairs of the company, every one of the directors is liable to be publicly examined The report should be of such a nature that will probabilise the opinion of the Official Liquidator that *prima facie* all the directors were concerned in the fraud If it is made out on the facts that all the directors were jointly concerned in the fraud, it may not be necessary for the Official Liquidator to go further and state which of the directors committed a particular fraud But in this case on the materials placed before the Court by the Official Liquidator, there is nothing to justify the opinion of the Official Liquidator that respondents 2, 3 and 4 were jointly concerned in the fraud It is not suggested that respondents 2, 3 and 4 were parties to the fraud of obtaining money by pledging the same vehicle several times over or by producing spurious bills to the banks There is nothing to indicate that respondents 2, 3 and 4 were parties to the transactions or knew about them in any way. Their drawing salaries would not show that they were privies to the crime So also the negligence attributed to the company of large borrowings and of not properly supervising the various contracts would not show that they were in any way concerned with the fraud.

The next contention of the learned Counsel for the respondents is that the fraud alleged does not relate to the promotion or formation of the company or to the affairs of the company since its formation, and therefore public examination of the respondents cannot be ordered Section 455 (2) as well as section 478 of the Companies Act refer to fraud committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation The fraud attributed in the report does not refer to the promotion or formation of the company and that portion of the section is not applicable to the facts of the case The only question is whether a fraud has been committed by any officer of the company in relation to the company since its formation It was contended by the learned Counsel for the respondents that the fraud practised by the company on strangers cannot be taken into account The following observation by Sir Francis Gore-Browne in the Handbook on the Formation, Management and Winding up of Joint Stock Companies at page 721 is relied on :

1. (1963) 1 All E R. 429 (P.C) 2. L.R. (1899) 1 Ch. D. 232.

" but no account of fraud practised by the company on strangers will be taken for this purpose "

Halsbury's Laws of England, Third Edition, Volume 6, page 570 states the position in the foot-note thus :

" The section does not apply where the only charges against the company are in relation to frauds in the course of its business with the outside world, and not connected with its promotion or formation "

Buckley on the Companies Act, at page 610 states the position thus .

" But the malpractice suggested must be connected with the promotion or formation of the company or the conduct of its affairs in its own economy, not frauds said to have been committed upon the outside world in the course of its business "

Again, at page 457 the learned author observes thus :

"And *a fortiori* fraud not connected with the formation or promotion, but against third parties in carrying on the business, does not ordinarily form a ground for a compulsory order by reason of the fact that investigation under such an order would be desirable "

Reliance is placed for these statements by Gore-Browne, Halsbury and Buckley on the decision reported in In re *Medical Battery Company*[1] In the decision cited on an action against a company to enforce the debentures one Davis, a Chartered Accountant was appointed receiver on 27th October, 1893 Davis was given liberty to carry on the company's business A petition was presented by a creditor on 27th October asking that the company might be wound up by the Court Subsequently a resolution was passed by the company that it had been proved to its satisfaction that it could not by reason of its liabilities continue its business and that it should be wound up voluntarily and that Davis should be appointed liquidator in such winding up The petition was amended to include a prayer that the voluntary winding up might be continued under the supervision of the Court and that some other liquidator in the place of Davis might be appointed When these petitions were pending several articles appeared in the press making serious allegations as to the conduct of the business of the company The Managing Director on behalf of the company took out action for libel against the publisher of the newspaper It was urged before the Court that in acting under section 145 of the Companies Act, 1862, it would have to take into consideration that the rights of the creditors would be prejudiced by the voluntary winding up, not only as regards money results, but also by their exclusion from the benefits conferred by the Companies (Winding up) Act, 1890, and especially the investigation in public under section 8 of that Act Section 8 relating to public examination is not applicable to voluntary winding up The learned Judge, while holding that the creditors would not be prejudiced by not obtaining the benefit of section 8 of the Act of 1890, observed that it would be wrong to hold that section 8 was intended to apply to a case where the charges made were brought against the company of having committed frauds in the course of its business with the outside world, and not connected in any way with promotion or formation of the company—that is to say, of its conduct towards persons dealing with it other than shareholders as regards their membership in the company. The above observation of the learned Judge is relied on in support of the contention that a public examination cannot be ordered regarding the conduct of the company towards persons dealing with it other than shareholders as regards their membership in the company. It will have to be noted that the learned Judge was dealing only with fraud relating to promotion and formation of the company and not with the clause in section 8 relating to fraud committed ' by any officer of the company in relation to the company since the formation thereof' The fraud that is referred to in section 455 (2) as well as section 478 of the Companies Act also covers the fraud ' by any officer of the company in relation to the company, since the formation' In the case of the officers, the fraud need not relate to promotion or formation of the company It is sufficient if it is in relation to the company since its formation It is contended that 'in relation to the company ' would only mean fraud by the officer in relation to the company but not as regards outsiders It is difficult to accept this contention, for, so far as the officer is concerned, by engaging in illegal activities as in the case of obtaining money on false pretences for the company, the officer is committing a fraud in relation to the company. The phrase ' in relation to ' would mean the way in which one thing is con-

nected with another. The fraud as such is committed by the person as an officer in relation to the company The contention of the directors that acts of the company relating to strangers would not come within the purview of section 478 cannot therefore be accepted The decision in In re *Medical Battery Company*[1], relied on by the learned Counsel for the respondents cannot be of any avail, as it did not relate to a fraud by the officer in relation to the company after its inception For the reasons stated I am of the view that there are sufficient grounds for ordering a public enquiry against the first respondent but not against respondents 2, 3 and 4.

So far as the first respondent is concerned, it was contended that his public examination would amount to a testimonial compulsion which is prohibited under Article 20 (3) of the Constitution of India Article 20 (3) of the Constitution prohibits compelling a person accused of any offence to be a witness against himself The submission of the learned Counsel for the 1st respondent is that a criminal prosecution had been launched against the first respondent, which had ended in his conviction and that he has preferred a criminal appeal which is pending in this Court. It is submitted that, if he is subjected to public examination, answers incriminating himself may be extracted, which will gravely jeopardise his chances in the appeal. Reliance was placed on the decision in In re *Atherton*[2]. The accused in that case a few days before the receiving order was arrested in London under the Fugitive Offenders Act, 1881 on a criminal charge and was on remand pending proceedings before a Magistrate His public examination was held at the London Bankruptcy Court. The learned Judge referred to the practice in London of not pressing such questions in relation to the alleged offence while the criminal charge was hanging over the debtor, but of adjourning the public examination until after the trial, and observed that it was only a rule of convenience and tenderness, and that, though followed generally, there might be occasions where it would be desirable not to follow it. Much reliance cannot be placed on this decision by the first respondent, as the learned Judge himself has observed that there might be occasions when this practice might not be followed Further, in that case the criminal proceedings were pending before the Magistrate's Court and there would have been some embarrassment to the accused in subjecting himself to a public examination Above all it will have to be observed that we are governed by Article 20 (3) of the Constitution of India and not by the practice in London.

In *Narayanlal* v *M P. Mistry*[3], the Supreme Court, while considering the question whether an examination of a person under the Indian Companies Act would offend the provisions of Article 20 (3) of the Constitution of India, held that Article 20 (3) of the Constitution of India had no application, as there was no accusation in the sense in which that expression had been construed The compulsion introduced by the provision of the Companies Act is not the compulsion which can be struck down by the provisions of the Constitution.

In *Joseph Augusthi* v *Narayanan*[4], the Supreme Court construing section 45-G of the Banking Companies Act, 1949 held that the provision did not contravene Article 20 (3) of the Constitution of India Referring to Article 20 (3) of the Constitution of India, the Supreme Court observed that it is only when a person is said to have been accused of any offence that the prohibition prescribed by Article 20 (3) comes into operation and that if a person who is not accused of any offence is compelled to give evidence and evidence taken from him under compulsion ultimately leads to an accusation against him, that would not be a case which would attract the provisions of Article 20 (3) Public examination under the provisions of the Companies Act would not amount to accusation and is not prohibited under Article 20 (3) of the Constitution of India The submission that it may prejudice the first respondent in his criminal appeal will not entitle him to the protection under Article 20 (3) of the Constitution of India.

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1 L R (1894) 1 Ch D. 444.
2. L R (1912) 2 K B D 251
3 (1961) 1 S C J 353· (1961) 1 M L J (S C.) 73: (1961) 1 An. W.R (S C.) 73 (1961) 1 S C R 417 A I R 1961 S C, 29
4 (1964) 1 Comp. L J 294 (1964) 1 S C.J. 676 : 34 Com Cases 546.

In the result the application of the Official Liquidator is allowed so far as the 1st respondent is concerned, and dismissed as regards others. The Official Liquidator is authorised to engage a Counsel, conduct the public examination of the 1st respondent and incur the necessary expenditure The examination will be conducted by the Master Report within six months This order will be suspended or three weeks to enable the first respondent to file an appeal.

V.S. ——— *Application ordered against first respondent*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE M NATESAN.

P Jayader .. *Appellant**

v

Thiruneelakanta Nadar Chinnaneela Nadar and others .. *Respondents.*

Religious endowments—Private family endowment—Powers of trustee or manager—Limitations—Power of civil Court to grant appropriate relief to restrain trustee from effecting fundamental changes.

It is well settled that in the case of a private religious endowment, even a majority of persons in whom the management is vested cannot alter the fundamental principles relating to the endowment which may destroy the trust upon which the property was dedicated When such is the position, it goes without saying that a person who has been under a family arrangement placed in charge of a temple and its administration for the family, cannot singly act in such a manneras to affect the character of the worship at the shrine

In the case of a private family temple it is not open to any one member of the family who may be in management to convert it into a public temple nor can he in the exercise of his powers of management alter the custom, mode of worship or character of the institution In these matters, the faith, belief and religious susceptibilities of the members of the family for whom the shrine is intended is of paramount importance.

There can be no doubt about the power of the civil Court to grant appropriate relief in cases where, with reference to a private endowment, the trustee or manager in possession acts in such a way as to jeopardise the private character of the worship at the shrine or alter the nature of the worship substantially or does any other act as to interfere with the rights of the members of the family to take part in the worship as per the established usage and custom

The essence of a family endowment is that the members of the family alone are entitled to worship and to manage the affairs of the endowment Even the power of all the members of the family who are interested in the worship of the deity, to change the character of the property has been doubted in recent times The law of perpetuity and remoteness does not affect the dedication and there is no reason why the other incidents of a private trust should be applied to it It is doubtful, in the circumstances, whether it will be open to all the members at any particular point of time to change the character of the institution

In the instant case the ceremonious putting up of a board with the words *Om Neela Narayana Namah* on it, within the shrine of a family temple and the addition of certain structures by slight alteration of the existing building, thereby providing space for going round the *sanctum sanctorum*, did not in any way affect the normal and accustomed mode of worship at the shrine , nor were those changes, effected by a person who was managing the temple on behalf of the family, of such a fundamental character as to amount to breach of trust The prayer for injunction for removal of the board as well as for restoration of the temple to its old state, must therefore fail

Appeal against the decree of the District Court of Kanyakumari at Nagercoil in Appeal Suits Nos. 277 and 287 of 1959 preferred against the decree of the District Munsif of Nagercoil in Original Suit No. 81 of 1957.

K. Rajah Ayyar and *P. Ananthakrishnan Nair*, for Appellant.

T. R Ramachandran and *R Sivapunniyam*, for Respondents

The Court delivered the following

JUDGMENT —This Second Appeal is from the decree of the lower appellate Court which *inter alia* has granted certain reliefs for injunction in favour of the plaintiffs with reference to a private temple which is the subject-matter of the suit The defendant now represented in the Second Appeal by his legal representatives objected particularly to the injunction directing the removal of a board with a sacred *manthra* on it from the *sanctum sanctorum* of the temple and for the demolition of certain new constructions put up with a direction to restore the temple to its original structures.

The parties are referred to as they figured in the trial Court The two plaintiffs and the sole defendant were brothers and sons of one Thiruneelakanta Nadar. This

* S A. No. 548 of 1960. 19th February, 1965.

Thiruneelakanta Nadar pre-deceased his father Karankattan Nadar. The family is a rich and prosperus one in the locality and the evidence is that the plaint property which is temple in which the family deity Neelaswami is worshipped has been there for over one hundred years, the shrine being within a portion of the family house Property of considerable value has been set apart for the shrine by this family and Karankattan Nadar was during his lifetime in management of the temple properties and the affairs of the temple There is no idol as such installed in the temple but there are lamps, *Kuthuvilakkus*, several of them placed there which burn authrough the day and night These are worshipped with flowers The evidence shows that after Karankattan Nadar, the defendant had been performing the puja at the shrine and managing the properties of the temple Any way there is a document Exhibit A-2, partition deed in the family, evidencing the arrangement by which the defendant was placed in charge of the family temple and its properties Though in the earlier stages of this litigation the defendant had contested in a rather vague manner the position that it is a private family temple, the matter is not now in dispute before me, as it cannot in view of the recitals in Exhibit A-2 The evidence also shows that the defendant was properly and regularly conducting all the functions connected with the shrine and performing the puja devotedly. The complaint of the plaintiffs and the cause of action for the suit are the ceremonious putting up of a board within the shrine with the words *Om Neela Narayana Namah* and addition of certain structures by slight alterations of the existing building thereby providing space for going round (*Paradakshinam*), the *sanctum sanctorum.* It is the case of the plaintiffs that by these acts the defendant who had been under a family arrangement placed in charge of the temple and its properties for the family, was varying the nature and character of the institution and that the acts and conducts were likely in the end to change the character of the institution into a public temple.

The Court of first instance upheld the plea of the plaintiffs that the defendant was in possession of the property for Neelaswami, their family deity and that his possession was for the benefit of the family members. The evidence established that the family members and others whom they chose to permit participated in the feast on Fridays and that the members of the family offered puja to the deity The defendant's position, it was held, was that of a trustee for the family members in respect of the administration of the family temple. However, the first Court held that the impugned acts of the defendant were not acts of waste and while granting a declaration that the plaint property was the family property denied the further reliefs claimed by the plaintiffs The lower appellate Court while observing that the alteration of temple premises like plastering the floor and putting up new wall may not amount to acts of waste felt that they changed the character of the buildings and that this should not be allowed. With reference to the board containing the sacred *manthram* (*Om Neela Narayana Namah*) the Court held that as there was a ceremonious installation of the board, *manthra prathishta* it had made a difference In that view, and as particularly the defendant in the earlier stages had denied the family character of the temple and asserted that his administration of the temple affairs could not be questioned, the lower appellate Court granted all the reliefs as prayed for in the plaint An appeal had been preferred to the lower appellate Court by the defendant against the decree granting declaration alone and this naturally got dismissed.

As stated at the outset there is no serious dispute before me that the shrine or temple is the private temple of the parties and the management of the same by the defendant was under a family arrangement and that the defendant was in the position of a trustee with reference to his management and administration of the shrine. But it is contended for the defendant who was the original appellant before me that the relief of injunction granted cannot be maintained and that the acts of the defendant which were impugned were acts of the defendant *bona fide* made in the course of the management of the shrine These acts, it is stated, are in fact meritorious acts adding to the convenience in worship and cannot be considered to be acts of waste or acts in excess of the defendant's powers as trustee and manager of the shrine. For the plaintiffs, it is contended, that the defendant had no absolute rights, to act at his pleasure even in the matter of administration and that he cannot make any

substantial alterations with reference to the buildings or in other matters of administration without reference to them It is argued that to-day it may be the putting up of a board with some sacred *manthram* on it and *prakaram* for *pradakshinam* but to-morrow it may be the installation of an idol in the shrine or a Nandhi or Dwajasthambam Other paraphernalia of public temples may be brought in and access allowed to the public ultimately leading to the public claiming the temple as a public one.

The law with reference to private religious endowments on this aspect of the matter is thus set out in Ganapathi Iyer's *Hindu and Muhammadan Endowments*, Second Edition, at page 173.

"As regards the third point, the Privy Council have held that in the case of a private religious endowment the consensus of the family can give any turn to the endowment"

In Mukherjea's *Hindu Law of Religious and Charitable Trust* at page 176, it is observed

"The property cannot therefore be taken away from the deity or diverted to other purpose without the consent of the idol".

Even the power of all the members of the family, male and female, who are interested in the worship of the deity to change the character of the property has been doubted in recent times as, the property if once it is dedicated to the family deity, the endowment becomes a religious and charitable trust in the proper sense of the term The law of perpetuity and remoteness does not affect the dedication as noticed in Mukherjea's *Law of Endowments* above referred to, and there is no reason why the other incidents of private trust should be applied to it It is doubtful in the circumstances whether it will be open to all the members at any particular point of time to change the character of the institution (vide *Law of Endowments Hindu and Muhammadan*, by Ghosh, Second Edition, page 207, and Mukherjea's *Hindu Law of Religious and Charitable Trust*, Second Edition, page 176) The Essence of a family endowment is that the members of the family alone are entitled to worship and to manage the affairs of the endowment (Ganapathi Iyer's *Hindu and Muhammadan Endowments*, Second Edition, page 565)

There can be no doubt about the power of the civil Court to grant appropriate relief in cases where, with reference to a private endowment, the trustee or manager in possession acts in such a way as to jeopardise the private character of the worship at the shrine or alter the nature of the worship substantially or does any other acts as to interfere with the rights of the members of the family to take part in the worship as per the established uasge and custom In *Elayalwar Reddiar and others* v *Namberumal Chettiar*[1], it is laid down a page 304 no doubt in dealing with a public temple :

"The Courts are bound to restrain a trustee from injuring the interests of the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution The ground upon which the Courts exercise such jurisdiction over him is that such departure on his part amounts to a breach of legal duty incumbent on him"

The principle regarding private religious endowments cannot be different. For instances of relief by Courts restraining trustees by injunction making unjustifiable changes which would affect the character of the temple as a religious institution, reference may be made to the decision of a Division Bench of this Court in *Krishnaswami Ayyangar* v *Samaram Singaracharlar*[2] Reference is made therein to an unreported case of this Court where protection was granted to a worshipper from introduction of idols or other objects which interfered with the form of worship for which the temple was dedicated It is well-settled that even a majority cannot alter the fundamental principles relating to an endowment which may destroy the trust upon which the property was dedicated When such is the position and when even a majority of persons in whom the management is vested could not act in a way to affect the fundamental basis, mode and object of worship at the shrine, it goes without saying that the defendant singly cannot act in such a manner as to affect the character of the worship at the shrine. The underlying rule in matters

1. (1899) I L R. 23 Mad 298 10 M L J 86 2 (1906) I L R 30 Mad. 158 : 17 M.L J 1.

of religion and faith may be found in the observation of Lord Davey in *Free Church of Scotland (General Assembly of)* v *Overtoun (Lord)—Macalister* v *Young*[1]:

> " The question in each case is What were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created ? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so The bond of union, however, may contain within itself a power in some recognised body to control, alter, or modify the tenets and principles at one time professed by the association But the existence of such a power would have to be proved like any other tenet or principle of the association "

Now I shall examine the impugned innovations in the light of the above principles So far as the board *Om Neela Narayana Namah* is concerned, this it is stated was installed in or about the year 1951 The suit has been filed in 1957 The fact that the members of the family did not complain about this as an innovation affecting their worship for over six years is significant The plaint refers to changing the name of the deity which is worshipped It is difficult to imagine that this putting of the board is in any way likely to mislead as to the deity which is worshipped by the members of the family The suggestion on behalf of the defendant is that Neelaswami is not very different from Neela Narayanaswamy True, as observed by the lower appellate Court, it is not for the Court to say that there is not much difference in names What is important is how it affects the individual worshipper. But all that P W 3 states with reference to this board is that there was no necessity for such a board He would add that the installation is opposed to all tradition But he admits that the board was not causing any obstruction to the offering of worship as before He admits that no one wanted to worship the inscription He also admits that *Narayana* in *Neela Narayana* is a holy word. There is evidence that there are pictures of Gods put up on the walls in the *sanctum sanctorum*. P W 1 admits it The only apprehension that appears to have been voiced in the Court below and frankly stated here was that as there was a Narayanaswami temple in the neighbourhood, this might lead to confusion, the suit temple possessing considerable properties. The fear is totally groundless, as the view of the learned Subordinate Judge in appeal that the installation of the board made a difference does not imply that the name of the deity of the suit temple was being changed by the board Much has been made by the lower appellate Court of the statement of the defendant that there was *manthra prathishta* when referring to the putting of the board. Evidently all that the defendant must have meant was the ceremonious installation of the sacred words which the board contained True the defendant has spent some money on the intallation. How this installation of the board would give a handle to the public to claim it as a public temple passes one's comprehension The other innovation that has been the subject of the charge against the defendant is providing a *prakaram* or a passage for going round the *sanctum sanctorum* This, of course, it must be noted was an innovation just immediately before the suit and appears to have given rise to the suit It is admitted in the evidence of the plaintiffs that there was no interference thereby of any offering of worship as before According to the Commissioner, who was appointed in the suit for inspecting the shrine, the constructions were necessary and give safety to the temple proper. The Commissioner also notes that the construction of the corridor does not in any way interfere with the worship of the temple. The first plaintiff would state that it was possible to have a *pradakshinam* of the temple after the construction but that he did not know whether it was beneficial to perform *pradakshinam* to the deity in the temple. It may also be noted that the temple was originally, according to P W 1 a thatched building It was subsequently only tiled by Karankattan Nadar, the old structure being renovated and new structures being put up. On Friday, the members of the family gather together and do *bhajan* P W 3 admits that not only members of the family but others also come and worship and partake in the feast. Evidently, this is by permission He also admits that all the rituals and services are done at the temple as previously. Lighting of lamps, hanging garlands and the offering of worship are being carried on as before, after the innovation also The principal complaint appears to be that the plaintiffs were

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1. L.R. (1904) A.C 515, 645

not consulted in these matters and a vague apprehension that these innovations may eventually make it a public temple as the temple has considerable properties endowed by the family The properties are not the subject-matter of consideration in this suit.

Mr. T. R. Ramachandran, learned Counsel appearing for the plaintiff very fairly stated that it could not be seriously contended that these innovations are likely to affect or alter or in any way interfere with the character of the worship at the temple or the changes were of such a fundamental character as would amount to breach of trust. Learned Counsel only voiced what he would state is a reasonable apprehension in the minds of the members of the family, that this enthusiasm of the defendant may carry him to such an extent that later claims may be made by authorities or by members of the public that the shrine is a public one Learned Counsel submitted that this apprehension could not be said to be unfounded in view of the considerable endowments in favour of the temple and that his clients had come forward to safeguard the interest of the temple for the family Learned Counsel submitted that if it was made clear that the defendant had no absolute powers in the matter of administration and management, it may not be necessary at this stage to pull down the structures which have been constructed and which do not interfere with the custom and mode of worship. So far as the board is concerned as already stated, it has been there for over six years and if the putting of the board with the *manthrams* thereon was such a violent departure, the parties would not have kept quiet. Admittedly there are other pictures of Gods hung up in the *sanctum sanctorum* and it has not been made out by evidence that the introduction of the board has in any way affected the normal and accustomed worship at the shrine There is no evidence that the *manthram* inscribed in the board is opposed to the tenets and religious principles of the other members of the family The board has stood by all these years and the suit having been instituted about six years after the installation, it cannot be said that this is a case for grant of the discretionary relief for injunction simply to remove some vague apprehension in the minds of the plaintiffs As already stated, the temple being a private one, it is not open to any one member of the family who may be in management of the shrine to convert it into a public temple nor can he in the exercise of his powers and management alter the custom, mode or worship or character of the institution In these matters, the faith, belief and religious susceptibilities of the members of the family for whom the shrine is intended is of paramount importance The plaintiffs will, therefore, be entitled to have maintained the relief of declaration that the suit temple is a private family temple of the plaintiffs, and defendant But they cannot, however, claim a general injunction in the wide terms as prayed for On the observations above made the injunction for removal of the board with the *manthram* as well as for restoration of the temple to its old state by pulling down the new constructions has to go. The plaintiffs do not dispute that the person in management may carry out the usual repairs, plastering, etc The learned Subordinate Judge has missed the principles that should guide the determination of the issues involved in a case of this kind. It is needless to grant any injunction against the defendant restraining him from changing the nature of the trust as prayed for in the plaint as the defendant who had been placed in management of the temple is no more The charges and allegations were against him personally In the circumstances, in my view, the relief of declaration is more than ample to protest the character of the institution.

In the result, the decree of the trial Court granting a declaration in favour of the plaintiffs that the suit temple is a private family temple of the parties is restored, and the decree of the lower appellate Court set aside to the extent further reliefs were added In the circumstances there will be no order as to costs

No leave

V.K. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE KUNHAMED KUTTI.

M. Karunanidhi .. *Petitioner**

v

M. Raman, Assistant Commissioner of Police, Intelligence, Egmore, Madras and others .. *Respondents.*

Constitution of India (1950), *Article* 359 (1)—*Presidential order, dated 3rd November,* 1962, *made under—Ban imposed by—Scope and effect of—Pleas that can be urged by detenu under the Defence of India Act* (*LI of* 1962)

Defence of India Act (*LI of* 1962), *section* 3 (2) (15)—*Defence of India rules* (1962), *rule* 30 (1) (*b*) —*Detention under—Allegation of* mala fides *against detaining authority—Proof—Detention under Defence of India Act instead of under Preventive Detention Act*—Mala fides *if can be inferred—Activities for which a person can properly be detained under the Defence of India Act—If should be correlated to external aggression—Satisfaction as to necessity of detention—If and to what extent justiciable*

It is well settled that any claim for relief involving in substance a determination or enforcement of the specified fundamental rights, specified in the Presidential order, dated 3rd November, 1962, issued under Article 359 (1) of the Constitution of India, cannot be considered and granted by Courts be it under Article 32 or 226 of the Constitution of India or section 491 (1) (*b*) of the Criminal Procedure Code and is hit and covered by the ban under the Presidential Order That being the limited scope of the ban, any relief or claim which does not in any way depend on enforcement of the specified fundamental rights, is not affected by the ban.

Pleas like a detention order being in violation of the mandatory provision of the Defence of India Act, or being made *mala fide* or under a provision of law which suffers from the vice of excessive delegation are not pleas relatable to the specified fundamental rights and are, therefore, outside the purview of the Presidential Order and are not inhibited

A detenu cannot contend that, because his arrest was initially illegal as he was allegedly not informed at the time of his arrest under what authority he was apprehended, his continued detention is illegal, as such a plea being relatable to Article 22 of the Constitution is hit by the Presidential Order

It is true that it is open for a detenu under the Defence of India Act to plead that the detention order was made *mala fide* But mere allegation of *mala fides* will not be enough It must be proved by him In order to prove *mala fides* there must be more than a mere apprehension or assumption from premises which do not justify the same

It must be remembered that in a democratic form of Government difference of opinion, outlook, purpose and expression thereto by one or other of the forms or means are not an unusual phenomenon. It will be neither safe nor sound nor justifiable to impute personal motives to official acts done in the course of administration merely on the basis of such phenomenon of less or more degree An allegation of *mala fides* based on personal and private motives of an official act, has to be proved like any other fact in issue and only on the basis of materials which clearly bear out such personal and private motives and not something which in the ultimate analysis is no more than an assumption or apprehension

From the mere fact that a person has been detained under the Defence of India Act and not under the Preventive Detention Act, it cannot be inferred that the detention order was made *mala fide* Whether it is the power under the one or the other Act that calls for exercise, will depend on the facts and circumstances of each case and it is for the detaining authority to decide the question and the choice he so makes cannot by itself furnish a basis for an allegation that the order of detention is *mala fide*

The argument that because the proclamation of emergency issued by President in 1962 was occasioned by external aggression, the activities for which a man can properly be detained under the Defence of India Act should be related or correlated to external aggression is clearly untenable Merely because the external aggression was the reason for the proclamation of emergency it does not follow that the whole scope and effect of the proclamation is governed, controlled and conditioned by that reason in the matter of providing for the security of India Once the proclamation is properly made it extends to all aspects of the security of India, not merely from the standpoint of external aggression but also internal disturbances which will cover public safety, maintenance of public order and all peaceful conditions in any part or area in India

It is true that satisfaction as to the necessity of detention of a person is a quasi-judicial act Satisfaction must necessarily, involve the process of considering the *pros and cons* as to necessity of detention of a person and has to be arrived at *bona fide*, more especially when the person detained under rule 30 (1) of the Defence of India Rules is deprived, on account of the proclamation of emergency and of Presidential Order, of his elementary rights to contest and show cause against his detention, and arrived at also after a reasonable and careful consideration of relevant matters pertaining to necessity of detention of an individual But once the satisfaction is expressed to have been reached, the Court's power or jurisdiction to sit in judgment over or weigh it is very limited The satisfaction contemplated

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*W P. No. 800 of 1965 19th March, 1965.

by section 3 (2) (15) of the Defence of India Act and rule 30 (1) of the Defence of India Rules, is a subjective process and a subjective satisfaction, not open to judicial scrutiny with reference to objective tests, standards or considerations

However, if the satisfaction of the appropriate authority in making an order of detention of a person is shown to be *mala fide*, dishonest, fraudulent or an abuse of power for ulterior purposes unconnected with those in respect of which alone the power can properly be exercised, the Court, on those limited grounds, may interfere, for in such cases, it will be an exercise of power outside the purview of the statutory provisions and unauthorised by them

Petition under Article 226 of the Constitution of India under section 491-A, Criminal Procedure Code, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court, will be pleased to issue a writ of *habeas corpus* directing the respondents to produce the petitioner before the High Court and set him at liberty forthwith

K Narayanaswami Mudaliar, for Petitioner.

Advocate-General (*N Krishnaswami Reddi*) and Public Prosecutor (*V. P. Raman*), for Respondents

The Judgment of the Court was delivered by

Veeraswami, J—This is a Petition under Article 226 of the Constitution and under section 491 of the Code of Criminal Procedure for a writ in the nature of *habeas corpus* directing release of the petitioner from detention. He was apprehended at about midnight on 16th February, 1965, at his residence at Madras by the first respondent Assistant Commissioner of Police (Intelligence), Madras, and has been taken to Palayamcottai and detained at the Borstal School there from the morning of the 18th At 9 A M on that day he was served with the order of detention made under rule 30 (1) (*b*) of the Defence of India Rules, 1962 He is a member of the Madras Legislative Assembly and Deputy Leader of the Opposition. He is a member of the Dravida Munnetra Kazhagam and is said to be the Treasurer and leading member of the working committee of the party He alleges in his affidavit that he was a signatory to a resolution passed on 8th January, 1965, by the working committee of his party to treat 26th January, 1965, as a day of mourning because Hindi as the official language would come into operation on that day and the use of the English language would become permissive or optional, and that the party's programme was to hold meetings, condemn the imposition of Hindi as official language, to wear badges and hoist black flags within one's home, but no processions were authorised by the party and no violence has ever been countenanced. According to him, the Chief Minister of Madras, the fourth respondent, threatened his party with dire consequences if they were to observe 26th January, 1965, as a mourning day and that the Chief Minister and his partymen made provocative speeches against the Dravida Munnetra Kazhagam party members both on the floor of the Legislative Assembly and outside at public places The petitioner was to have addressed a meeting at Coimbatore on 26th January, 1965 But, the previous night, on his way to Coimbatore he was arrested at Karur, later taken to Tiruchirappalli Sub-jail and released on or about 2nd February, 1965 He says he is the editor of a paper called *Murasoli*, and in that paper he published, since 14th February, 1965, editorials and a series of cartoons attacking the fourth respondent on his political acts and policies In this back-ground, says the petitioner, his speeches, cartoons and editorials infuriated the fourth respondent and the order of his detention has been politically motivated and also motivated by the personal animosity and grudge against him of the fourth respondent and is *mala fide* and constitutes a fraudulent exercise of power The petitioner further states that the use of rule 30 (1) (*b*) of the Defence of India Rules, instead of the Preventive Detention Act, constitutes proof of *mala fides* and that the order of detention could not be considered to be one under that rule, as there could not have been satisfaction to the Governor who passed it and the order itself did not disclose the individual person who was satisfied before making it. The petitioner in short urges that the detention order is *mala fide* and illegal

The fourth respondent has personally sworn to a counter-affidavit, totally refuting and denying the petitioner's allegations and maintaining that the detention order was passed only on the basis of information duly received by Government through its official channels, regarding the activities of the petitioner, which, in the opinion of the Government, rendered his detention necessary to prevent him from acting in a manner prejudicial to public safety and maintenance of public order He has also specifically denied that the detention order was *mala fide*, or was made out of political vindictiveness or personal illwill or fury against the petitioner. He says that, in fact there was nothing personal either in his speeches or exchanges between him as the head of the Government and the petitioner as the Opposition Leader in the Legislative Assembly and that the detention order was made only after being satisfied on the basis of materials and reports officially received by the Government The petitioner, in his second affidavit by way of a reply to the first counter-affidavit of the fourth respondent, reiterated some of his earlier allegations and contentions and pointed out that the fourth respondent did not, in his counter-affidavit, specify the individual on whose satisfaction the order of detention was made and stated that for these reasons also the detention order was illegal He also added that his detention was in relation to disturbances in regard to the language issue and had nothing to do with the purposes of the Defence of India Act and the Rules made thereunder and to the security of India threatened by external aggression, the basis of the proclamation of the President under Article 352 of the Constitution and that further at the time of his apprehension and until he was served with the order of detention three days later, he was not even informed of the grounds of his arrest. In his further affidavit, the fourth respondent categorically stated that he, as Minister-in-charge of the portfolio, after carefully studying the reports and considering the information and the recommendation of the Special Branch, C I D., Madras was satisfied that the detention of the petitioner was necessary to prevent him from acting in a manner prejudicial to public safety and the maintenance of public order, and then passed the order of detention After once again traversing some of the petitioner's allegations, the fourth respondent concluded by stating that the order of detention was passed only on the strength of materials and information before Government and after he, as Chief Minister and Minister-in-charge of the portfolio and Public Department, was satisfied of the necessity to detain the petitioner.

Before we consider the submission made to us on behalf of the petitioner, it is necessary to direct our attention first to the ambit and nature of enquiry permissible or open in this petition in the context of Article 359 (1) of the Constitution and the Order of the President made thereunder Consequent on the aggression on 8th September, 1962, by the Chinese on the northern border of India, the President made a Proclamation on 26th October, 1962, under Article 352 of the Constitution. The Proclamation declared the existence of a grave emergency whereby the security of India was threatend by external aggression The Defence of India Ordinance, 1962, was also promulgated, which was later replaced by the Defence of India Act, 1962. On 3rd November, 1962, the President, in exercise of his powers under Article 359 (1), made an order suspending for the period the Proclamation of Emergency is in force, the right of any person to move any Court for the enforcement of the rights conferred by Articles 21 and 22 of the Constitution By a later order, Article 14 also was added At an earlier stage of the arguments before us, it was suggested for the respondents that in view of the President's Order, the petitioner cannot have from this Court the relief he has prayed for and that this petition should be dismissed *in limine* Learned Counsel for the petitioner urged, however, that the ban imposed by the Presidential Order is but confined to enforcement of fundamental rights under those Articles and that his petition being both under Article 226 of the Constitution and section 491 (1) (*b*) of the Code of Criminal Procedure, he is entitled to urge other grounds in support of the petition The precise question thus raised as to the scope and effect of the Presidential Order in relation to Article 359 (1) and the extent to which the bar affects an application under section 491 (1) of the Code of Criminal Procedure has been decided recently by a Special Constitu-

tional Bench of the Supreme Court in *Makhan Singh* v *State of Punjab*[1], and we are, therefore, relieved of the necessity of ourselves deciding it There it has been held at page 395 .

> " If any relief cannot be granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights, that is a proceeding which falls under Article 359 (1) and would, therefore, be hit by the Presidential Order issued under the said article That being so, we feel no difficulty in holding that proceedings taken by a citizen either under Article 32 (1) or under Article 226 (1) are hit by Article 359 (1) and the Presidential Order issued under it.
>
> The prohibition contained in the said article and the Presidential Order will apply as much to proceedings under section 491 (1) (*b*) as to those under Article 226 (1) and Article 32 (1) (at page 397) "

It is well settled, therefore, that any claim or relief involving in substance a determination or enforcement of the specified fundamental rights cannot be considered and granted by Courts, be it under Article 32 or 226 of the Constitution or section 491 (1) (*b*) of the Code of Criminal Procedure, and is hit and covered by the ban under the Presidential Order That being the limited scope of the ban, any relief or claim which does not in any way depend on enforcement of the specified fundamental rights, is not affiected by the ban This has been recognised by the Supreme Court in that case (at page 399)

> "If in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the order, his right to move any Court in that behalf is not suspended because its is outside Article 359 (1) and consequently outside the Presidential Order itself"

As pointed out by the Supreme Court, pleas like a detention order being in violation of the mandatory provisions of the Defence of India Act, or being made *mala fide* or under a provision of law which suffers from the vice of excessive delegation, are not pleas relatable to the specified fundamental rights and are, therefore, outside the purview of the Presidential Order and are not inhibited It follows, therefore, that we cannot permit the petitioner to urge before us any ground based on his fundamental rights covered by the Presidential Order, but at the same time, we cannot dismiss the petition *in limine* so far as it concerns pleas not involving such rights

The first submission for the petitioner is that the detention order against him was made *mala fide* A plea like that, which is of course open to the petitioner as it is outside Article 359 (1), has, however, to be proved by him As observed by the Supreme Court in *Makhan Singh* v *State of Punjab*[1], a mere allegation that the detention is *mala fide* would not be enough We have already referred to the allegations of the petitioner in his affidavits on which he has relied to show that his detention order is *mala fide* These allegations amount in effect to nothing more than this, the petitioner belonging as he does to a rival political party with his own views on certain matters of policy, has had several exchanges and encounters on the floor of the Legislative Assembly with the fourth respondent as the head of the State Government and of the ruling party and has made speeches and published in his newspaper several editorials of his and cartoons attacking the fourth respondent as the Chief Minister, particularly in the context of the language, question On account of these things, according to the petitioner, the fourth respondent has, out of political and personal animosity and ill-will, made the detention order *mala fide* It may be seen that the imputation in that manner to the fourth respondent of *mala fides* is a matter of the petitioner's inference or apprehension from his allegations relating to certain events, speeches, editorials and cartoons. We are of the view that in order to prove *mala fide* there must be more than such apprehension or assumption from premises which do not justify the same The affidavits and counter-affidavits before us do not show that there was anything personal in the exchanges between the petitioner and the fourth respondent on the floor of the Assembly or outside, and we are unable to conclude, merely on the basis of the averments in the petitioner's affidavits, that the fourth respondent, in making the order of detention, was actuated or motivated by personal or political ill-will or

1. A.I.R. 1964 S C. 381.

animosity against the petitioner The fourth respondent, in his counter-affidavits has also repeatedly and categorically denied that the order of detention he made was so actuated or motivated, and stated that on the basis of the materials reported to him through the normal official channels and their recommendations, he as the Chief Minister-in-charge of the concerned portfolio, was, on a careful cons deration thereof, satisfied that the detention of the petitioner was necessary to prevent him from acting in a manner prejudicial to public safety and maintenance of public order. We have no reason whatever to doubt the truth of the categorical denial and statement of the fourth respondent Learned Counsel for the petitioner places, however, strong reliance on the following sentence in the first counter-affidavit of the fourth respondent :

> " If by this the petitioner meant that I was personally offended by his publication, and I caused his detention for that reason alone, I deny the same "

It is said that the word *alone* in the sentence indicated that the fourth respondent was admittedly offended personally by the petitioner's publications and that this element also led the fourth respondent to make the detention order. We are unable to accept this construction of the sentence, if it is read in the context of the entire paragraph in which it occurs and in the light of the clear denials by the fourth respondent in several places of his counter-affidavits The sentence occurs in a paragraph which is in answer to paragraph 8 in the affidavit of the petitioner. In that paragraph the petitioner has in detail referred to the several cartoons relating to the fourth respondent as Chief Minister and an editorial of 16th February, 1965, in *Murasoli* published by the petitioner against him In that connection the petitioner went on to say that this editorial alone must have infuriated the fourth respondent. That appears to be the origin of the word *alone*, apparently repeated in the sentence extracted above from the counter-affidavit of the fourth respondent and we are unable to accept the contention merely on that basis that the fourth respondent had admitted impliedly or otherwise that in passing the order of detention against the petitioner, he was also actuated by the alleged fact that he was personally offended against him Even making full allowance to normal human reactions to criticism, it should be remembered that those who bear the burden of administration have additional and more onerous responsibilities of Government in its comprehensive implications and that in a democratic form of Government based on party system and party politics, difference of opinion, outlook, purpose and expression thereto by one or other of the forms or means are not an unusual phenomenon. It seems to us that it will be neither safe nor sound nor justifiable to impute personal motives to official acts done in the course of administration merely on the basis of such phenomenon of less or more degree In our opinion, an allegation of *mala fides* based on personal and private motives of an official act, has to be proved like any other fact in issue and only on the basis of materials which clearly bear out such personal and private motives and not something which in the ultimate analysis is no more than an assumption or apprehension On a careful and anxious consideration, we conclude that the petitioner has failed to substantiate that the detention order against him was made by the fourth respondent *mala fide*.

It is next argued for the petitioner that the detention order is a fraudulent or colourable exercise of power His learned Counsel urges that activities for which a man can properly be detained under the provisions of the Defence of India Act, should be related or correlated to external aggression He says that as the Proclamation of Emergency was occasioned by the external aggression of the northern borders of India, any activity of a detenu other than that affecting the security of India in the context of such external aggression will be irrelevant to a consideration of his detention under the provisions of the Defence of India Act. He points to the Preamble of the Act which recites that a grave emergency exists whereby the security of India is threatened by external aggression and, with reference to the petitioner's allegation in his affidavits that he co-operated with the Government in regard to the defence efforts, contributed to the Defence Fund and also collected funds and handed over the same for the purpose, argues that in such circumstances

the detention of the petitioner under the Defence of India Act, 1962, is a fraudulent order and a colourable exercise of power. This argument proceeds, in our view, on an incorrect appreciation of the scope and effect of the Defence of India Act. Under Article 352 (1) of the Constitution, the grave emergency contemplated is one that threatens the security of India or any part of its territory and such a threat may come from war or external aggression or internal disturbances Whether it is the one or the other source of threat, it is in each case a threat to the security of India or any part of it, so that once a Proclamation of Emergency is made, it is not confined to matters which directly concern with or relate to external aggression, but extend to all activities which affect the security of India or any part of it Merely because the external aggression was the reason for the Proclamation of Emergency, it does not follow that the whole scope and effect of the proclamation is governed, controlled and conditioned by that reason in the matter of providing for the security of India. External aggression is of course an alternative requisite for invoking the emergency power But once the Proclamation is properly made, it extends to all aspects of the security of India, not merely from the standpoint of external aggression, but also internal disturbances which will cover public safety, maintenance of public order and all peaceful conditions in any part or area in India It was said for the petitioner that a breach of the peace by reason of a civil dispute, as for example in respect of fishery rights or a piece of land or possession is not a matter to which the provisions of the Defence of India Act can be applied That is undoubtedly so Public order is a totally different matter and is of a wide connotation As pointed out by the Supreme Court in *Romesh Thappar* v *The State of Madras*[1], it signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted, and the concept of public order includes public safety We reject the petitioner's contention that it is only in respect of activities of a man which can be related to external aggression, he can be detained under the provisions of the Defence of India Act.

It is then urged by learned Counsel for the petitioner that the non-user of the Preventive Detention Act, which would have left some rights for the petitioner to contest the propriety of his detention, and resort to the provisions of the Defence of India Act, indicates the *mala fides* of the detention order We do not think there is any substance in this contention Whether it is the power under the one or the other Act that calls for exercise will depend on the facts and circumstances of each case and it is for the detaining authority to decide the question It will be seen that the power of detention under the Defence of India Act is much wider than that under the Preventive Detention Act, and extends to not merely prejudicial activities suspected on grounds appearing to the detaining authority to be reasonable, but to cases of persons with respect to whom such authority is satisfied that their apprehension and detention are necessary for the purpose of preventing them from acting in any such prejudicial manner. The scope of the more stringent power was described by the Federal Court in *Keshav Talpade* v. *King Emperor*[2], in these words at it page 68 : –

> " The Government has only to be satisfied that with a view to preventing him from acting in a particular way it is necessary to detain him The Government may come to the conclusion that would be wiser to take no risks, and may therefore subject a person to preventive detention against whom there is no evidence or reasonable suspicion of past or present prejudicial acts, or of any actual intention of acting prejudicially "

That is a power much wider than the power of detention under the Preventive Detention Act. As we said, it is the detaining authority that has to decide in the light of the materials and circumstances before him whether to detain a particular person under the one or the other Act, and the choice he so makes cannot by itself furnish a basis for an allegation that the order of detention is *mala fide*

We have already mentioned that the petitioner was served with the order of detention only on the morning of 18th February, 1965, at Palayamcottai He has

1 (1950) 2 M.L.J 390: 1950 S.C.J. 418: (1950) S.C.R 594.

2. (1943) 2 M.L.J. 90 1943 F.L.J (F.C.) 28. (1943) F.C.R 49.

complained that, at the time of his apprehension, he was not even told by what authority he was arrested and taken away from his residence But the first respondent swears in his counter-affidavit that, as a matter of fact, when he apprehended the petitioner, he did tell him by what authority he acted and that he was to be detained under the provisions of the Defence of India Act. In any case, it will be seen that the petitioner cannot successfully urge this point without invoking his fundamental right under Article 22 of the Constitution His contention that, because his arrest was initially illegal as he was allegedly not informed at the time of the arrest under what authority he was apprehended, his continued detention is illegal, has, therefore, to be rejected.

Lastly it is contended that the recent past conduct of the petitioner, as a relevant circumstance, would show the justiciability of the satisfaction claimed by the fourth respondent on 9th March, 1965. It was on that day the fourth respondent filed his second counter-affidavit, in which he clearly stated that he had himself carefully studied the reports and recommendations from the concerned officials and was satisfied that the detention of the petitioner was necessary to prevent him from acting in a manner prejudicial to public safety and the maintaining of public order. The petitioner says that this statement of the fourth respondent came belatedly and only after he had pointed out in his reply affidavit that the fourth respondent had in his first counter-affidavit failed to particularly specify the authority which was satisfied to make the order of detention. It is true that in the first counter-affidavit of the fourth respondent there was no clear statement that he had himself applied his mind and was satisfied that the petitioner should be detained But the fourth respondent did say in that counter-affidavit that the detention order was passed following the usual procedure and the contention that no individual was satisfied about the necessity for detaining the petitioner was incorrect It would obviously have been better if, instead of putting the matter in that manner, a clear statement had been made in the first counter itself that the fourth respondent was himself satisfied But the failure to do so, which has been strongly relied on by the petitioner, makes, in the circumstances, no difference to the fact that the fourth respondent did satisfy himself before making the order of detention that it was necessary on the facts and circumstances before him He has stated to that effect in his second counter-affidavit, which we have no hesitation in accepting The learned Advocate-General also produced before us the original papers relating to the order of detention which show that the fourth respondent on 16th February, 1965 had in his own hand ordered detention of the petitioner on his express view that with reference to the materials before him it was necessary to detain the petitioner He had also indicated in his order the prison in which he should be detained, which, by his order again the next day, was altered as the Borstal School at Palayamcottai where the petitioner is under detention. In the circumstances, therefore, there is no substance in the petitioner's contention that the fourth respondent had not satisfied himself as to the necessity of his detention when the detention order was made.

It is true, as contended by learned Counsel for the petitioner, that satisfaction as to the necessity of detention of a person is a quasi-judicial act Satisfaction must necessarily, therefore, involve the process of considering the *pros and cons* as to necessity of detention of a person and has to be arrived at *bona fide*, more especially when the person detained under rule 30 (1) of the Defence of India Rules is deprived, on account of the Proclamation of Emergency and of the Presidential Order suspending the remedy to enforce the specified fundamental rights, of his elementary rights to contest and show cause against his detention, and arrived at also after a reasonable and careful consideration of relevant matters pertaining to necessity of detention of an individual. But once the satisfaction is expressed to have been reached by the proper authority, the Court's power or jurisdiction to sit in judgment over or weigh it is very limited The satisfaction contemplated by section 3 (2) (15) of the Defence of India Act, 1962, and rule 30 (1) of the Defence of India Rules, 1962 is a subjective process and a subjective satisfaction, not open to judicial scrutiny with reference to objective tests, standards or considerations. We are not here concerned with the question whether, where a detention order is made

under the first part of section 3 (2) (15) on suspicion based on grounds appearing to the detaining authority to be reasonable, such grounds are open to judicial review. The power of detention under the second part of this sub-section is wider and more drastic and the condition for its exercise is only that the detaining authority should be satisfied that the apprehension and detention of a person are necessary for the purpose of preventing him from acting in any prejudicial manner mentioned We have already referred to the scope of the more drastic power as interpreted by the Federal Court in *Keshav Talpade* v. *King Emperor*[1], namely:

> "The Government may come to the conclusion that it would be wiser to take no risks, and may therefore subject a person to preventive detention against whom there is no evidence or reasonable suspicion of past or present prejudicial acts, or of any actual intention of acting prejudicially."

This observation of the Federal Court was as regards the scope of rule 26 of the Defence of India Rules, 1939, but the language of section 3 (2) (15) second part and of rule 30 of the Defence of India Rules, 1962, being, for present purposes, practically *in pari materia*, that observation applies to their interpretation as well. We are aware that the *vires* of rule 26 was upheld by the Privy Council later[2], differing from *Keshav Talpade* v. *King Emperor*[1]. But that did not affect the construction and scope of rule 26. It follows, therefore, that this Court cannot review the propriety or otherwise of the satisfaction reached by the fourth respondent on its merits. It may be that if the satisfaction of the appropriate authority in making an order of detention of a person is shown to be *mala fide*, dishonest, fraudulent or an abuse of power for ulterior purposes unconnected with those in respect of which alone the power can properly be exercised, the Court, on those limited grounds, may interfere, for, in such cases, it will be an exercise of power outside the purview of the statutory provisions and unauthorised by them. But in this case, as we already mentioned, the petitioner has failed to show that the detention order against him suffers from any such infirmity.

The petition is dismissed.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. P. CHANDRA REDDY. *Chief Justice* AND MR. JUSTICE K. S. RAMAMURTI.

S. Murugesan .. *Petitioner**

v.

The Collector of North Arcot (Inspector of Panchayat), Vellore-*cum*-Election authority, North Arcot and others .. *Respondents.*

Madras Panchayats Act (XXXV of 1958), sections 3 (1) (a), 8 (1), 15 and 16—Scope and applicability of section 3 (1) (a) read with section 8 (1)—Section 15 if requires reservation of at least one seat in every panchayat for members of Scheduled Castes—Power conferred by section 16 on Inspector to divide a village or town in-to wards—Scope of—Absence of rules regulating the manner of such division—Jurisdiction of Inspector to effect division if affected.

Interpretation of Statutes—Mandatory and directory provisions.

Constitution of India (1950), Article 226—Elections to panchayat—Petitioner participating in elections without any objection to manner of division of panchayat into wards—Cannot challenge elections later, on ground that such division was improper

Section 3 (1) (*a*) and section 8 (1) of the Madras Panchayats Act (XXXV of 1958) (hereinafter referred to as the Act) cover panchayats that come into existence for the first time and do not take within their ambit the panchayats which were already in existence when the Act came into force That this is so is manifest from rule 2 in Schedule IV of the Act. Thus, in the case of a first reconstitution in accordance with the provisions of the Act of a panchayat in existence at the commencement thereof, there is no need for a notification contemplated by section 3 read with section 8 of the Act and hence in such a case the absence of a notification under section 3 would not invalidate the constitution of the panchayat.

1. (1943) F.C.R. 49, 68 : 1943 F.L.J. (F.C.) 28 : (1943) 2 M.L.J. 90.
2. *Emperor* v. *Shibnath Banerji*, (1945) 2 M.L.J. 325 (P.C.): L.R. 72 I.A. 241.

*W.P. No. 501 of 1965. 9th April, 1596.

The argument that an obligation is cast by section 15 of the Act on the Inspector to reserve at least one seat in every panchayat for members of the Scheduled Castes and Scheduled Tribes and that election of members to a panchayat without such reservation would nullify the elections, is untenable It is true that in some contexts, the word 'may' (which is the word used in section 15) may denote compulsion But *prima facie* it imports only a discretion, and it should be construed as discretionary unless there is anything in the context to indicate that it is meant to be mandatory. It is a golden rule of construction or interpretation of statutes that the words of an enactment must be given their ordinary meaning There is nothing in the Act to indicate that section 15 is meant to be mandatory. The non-reservation of seats for Scheduled Castes and Scheduled Tribes would not therefore vitiate either the division of the village into wards or elections based thereon.

The division of a panchayat into wards by the Inspector under section 16 of the Act would not be without jurisdiction merely because no rules prescribing the scales in accordance with which the division is to be effected are formulated by the Government as provided by the latter part of section 16. Section 16 makes it imperative for the Inspector to divide a panchayat village or town into wards after consulting the panchayat and conformably to the scale if it is prescribed If the Government, which is the authority to make the Rules by virtue of section 178, fails to exercise that power in relation to section 16 it could not be postulated that there could be no division of the village or town into wards and elections based upon this division The Government is under no obligation to make the Rules, as the language used in section 16 is one of mere permission The formulation of Rules prescribing a scale is not a pre-requisite to the division into wards by the Inspector. The Inspector is under an obligation to effect division irrespective of the existence or non-existence of the scale This is not a case of power coupled with a duty, in which case it might plausibly be contended that the power could not be exercised without fulfilling the obligations cast upon the Inspector Thus, the absence of Rules prescribing the scale would not vitiate either the division of the panchayat village or town into wards or elections based thereon

Further, a person who has acquiesced in the elections being conducted on the basis of the division of wards effected by the Inspector though there were no Rules regulating such division, cannot later, after the elections were over, make a grievance of the mode of division of the panchayat into wards and challenge the elections under Article 226 of the Constitution of India on that ground

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *quo warranto* directing the respondents to show cause why and by what authority respondents 2 to 14 claim to have, use, enjoy, and perform the rights, duties and privileges of the office of the members of the panchayat of Thakkolam and direct the said respondents, not to intermeddle in any manner with the said office and declare the same to be vacant.

S. Mohan Kumaramangalam for *K. V. Sankaran, S. K. Rajavelu* and *G. Shanmugham*, for Petitioner.

Advocate-General (*N. Krishnaswami Reddi*) for Additional Government Pleader (*V. Ramaswami*) and *V. K. Thiruvenkatachari* for *R D. Indrasenan*, for Respondents.

The Judgment of the Court was delivered by

Chandra Reddy, C J.—The petitioner claims the issuance of a writ of *quo warranto*, directing respondents 2 to 14 to exhibit information as to the authority under which they could perform the duties of the members of the Panchayat of Takkolam. The facts giving rise to these proceedings may be briefly narrated Takkolam is a whole revenue village of North Arcot district, which was constituted as a panchayat in 1917. Under the Madras Village Panchayats Act, 1950, it was classified as a second-class panchayat. After the Act of 1950 came into force, a notification under section 61 of that Act was issued on 22nd December, 1952, fixing the strength of the panchayat at eight exclusive of the President and there was no reserved seat for the Scheduled Castes. Subsequently, by a notification dated 8th March, 1958, the then Regional Inspector of Municipal Councils and Local Boards, North Arcot district, fixed the strength of the panchayat at fifteen, and divided the village into five wards, allocating 4, 4, 2, 2 and 3 to Wards Nos 1, 2, 3, 4 and 5 respectively It may be mentioned here, that this time also, no reservation was made for Scheduled Castes. This notification was considered by the panchayat and approved at its meeting held on 19th March, 1958.

On 1st June, 1961, the Collector of North Arcot classified Takkolam as Class I panchayat, as required by section 5 (1) (*a*) of Madras Act X of 1950, with effect from 1st April, 1961, since the population of that village had increased to 6,105. Meanwhile, Madras Act XXXV of 1958, hereinafter referred to as the Act, which

consolidated all the law in relation to local administration, was put on the statute book. In accordance with the scale prescribed under section 10 of this enactment, the strength of the panchayat as also the number of wards was proposed to be fixed at thirteen. Even now, no reservation for the Scheduled Castes was proposed This proposal was considered and accepted once again by the panchayat at its meeting held on 21st August, 1964, the meeting being attended by thirteen, including the petitioner and the proposal was accepted unanimously The notification fixing the strength of the panchayat, as also the number of wards, was published in the *Fort St. George Gazette* Supplement, Part II, dated 9th December, 1964 Subsequently, elections were held on 28th January, 1965, and respondents 2 to 12 were declared elected.

Questioning the validity of these elections, this writ petition has been filed for the relief mentioned above. In support of this petition, three contentions are urged by Sri S Mohan Kumaramangalam : (i) The panchayat was not validly constituted, as no notification contemplated by section 3 of the Act was issued ; (ii) the non-reservation of seats for the members of the Scheduled Castes had nullified the elections ; and (iii) the division of the village into wards by the Inspector was without jurisdiction, as no Rules prescribing the scale in accordance with which the division was to be effected, were formulated by the Government and this had rendered all the elections void

We shall now deal with these points seriatim. The first contention is based on the language of sections 3 and 8 of the Act In order to test the soundness of this argument, we have to read the provisions of these two sections. Section 3, in so far as it is relevant for this enquiry, runs as follows :

"(1) The Inspector shall by notification—

(a) classify and declare every local area comprising a revenue village or villages or any portion of a revenue village or contiguous portion of two or more revenue villages and having a population estimated at not less than five thousand and an annual income estimated at not less than ten thousand rupees as a panchayat town for the purposes of this Act "

Section 8, omitting the unnecessary portions, reads thus :

"(1) A panchayat shall be constituted for each village and for each town with effect from such date as may be specified in the notification issued in that behalf by the Inspector "

Basing himself on these two provisions, learned Counsel for the petitioner contends that the non-notification of Takkolam as town panchayat has resulted in the invalidity of the constitution of the panchayat. We are not disposed to accede to this proposition. In our opinion, these two sections cover panchayats that come into existence for the first time and do not take within their ambit the panchayats which were already in existence. That this is so is manifest from the relevant Rules in Schedule IV of the Act. Section 190 of the Act requires that the Act shall be read subject to the Rules in Schedule IV. That section recites :

"In regard to the first constitution of panchayat union councils in accordance with the provisions of this Act and in regard to the first reconstitution in accordance with the provisions of this Act of panchayats in existence at the commencement thereof, and otherwise in first giving effect to the said provisions they shall be read subject to the rules in Schedule IV."

We shall now turn to the material provisions of Schedule IV, which contains transitional provisions. Rule 2 enacts :

"2 Every panchayat which was classified as a Class I panchayat under the old Act shall on the said date be deemed to have been classified as a town panchayat under this Act and all panchayats which before the said date were known as Class II panchayats, shall, after the said date, be known as village panchayats

3. Every local area which, immediately before the said date, was within the jurisdiction of a Class I panchayat shall be deemed to have been declared to be a panchayat town under this Act and every local area which immediately before the said date was within the jurisdiction of a Class II panchayat shall be deemed to have been declared to be a panchayat village under this Act.

4. The total number of members of a panchayat fixed under the old Act and in force on the said date shall be deemed to be the total number of its elected members under this Act

5 The members of a panchayat holding office on the said date shall be deemed to be the elected members of the panchayat under this Act and such members shall continue to hold office up to such

date as the Government may, by notification, fix in this behalf or in case no such date is fixed up to the date on which their term of office would have expired if this Act had not come into force

6. The reservation of seats for the members of the Scheduled Castes made under the old Act and in force on the said date shall be deemed to have been made under this Act "

It is plain from these provisions that, so far as the reconstitution of the panchayats is concerned, the panchayats that were in existence at the commencement of the Act shall be deemed to have been declared to be panchayats and the total number of panchayat members fixed under the old Act shall be deemed to be the total number of its elected members under this Act The sitting members also were deemed to be continuing till such date as the Government, by notification, fix in this behalf The position was the same in regard to the reservation of the seats also. So, the panchayat in question was continuing under Act XXXV of 1958, as if it was constituted under the relevant provisions of this Act It is not suggested that the Takkolam Town Panchayat was not properly constituted under Madras Act X of 1950. It may be mentioned here that the alteration with regard to the strength of the panchayat and the number of divisions was in accordance with the new enactment In this situation there was no need to issue notifications, classifying Takkolam as a panchayat town under section 3 of the Act and constituting a panchayat for this town under section 8 of the Act We are, therefore, unable to give effect to the first contention.

We feel that the second point is equally untenable. The provision of law relating to this submission is contained in section 15 That says .

" In every panchayat, the Inspector may, subject to such rules as may be prescribed by notification, reserve such number of seats . . . (not exceeding 3). . for the members of the Scheduled Castes (and Scheduled Tribes). ...."

It is maintained by learned Counsel for the petitioner that an obligation is cast by this section on the Inspector to reserve at least one seat for members of Scheduled Castes and Scheduled Tribes It is said that, although the expression used by this section is *may*, it has compulsory force of *shall*, having regard to the alleged intention of the Legislature that the interests of the members of the Scheduled Castes and Scheduled Tribes should be safeguarded We are not inclined to accept this construction of section 15. It is true that, in some contexts, the word *may* may denote compulsion But, *prima facie*, it imports only a discretion, and it should be construed as discretionary, unless there is anything in the context to indicate that it is meant to be mandatory. It is a golden rule of construction or interpretation of statutes that the words of an enactment must be given their ordinary meaning. We do not find anything in the statute under consideration which requires us to deviate from this rule There can be little doubt that discretion was vested in the Inspector to give reservation to Scheduled Castes and Scheduled Tribes if it was necessary in their interests; and to give proper representation to this section of the population. It would have been far from the intention of the Legislature to compel the Inspector to reserve seats for the Scheduled Castes and Scheduled Tribes, irrespective of whether they would even otherwise secure proper representation or not. In cases like this, there is no need for making any such reservation, in view of the fact that the Scheduled Castes could get their representatives elected to the panchayat. It may incidentally be mentioned that, subsequent to 1950, no reservation of seats was made for the members of the Scheduled Castes and Scheduled Tribes, and the notifications omitting reservation for the panchayats were unanimously approved by the panchayat on all occasions For these reasons, we hold that the non-reservation of seats for the Scheduled Castes has not vitiated either the division of the village into wards or elections based thereon. As regards the intention of the Legislature, it has to be gathered from the language employed by it, and the language does not lend any colour to the theory propounded on behalf of the petitioner.

The learned Counsel next laid stress on the omission, in section 15 of the Act, of the expression *if any* which occurred in the earlier statute and argues it indicates that no option was left to the Inspector in the matter of such reservation. We are not inclined to attach any significance to the absence of these words in section 15,

of the Act. It is innocuous and does not denote compulsion, as suggested by Sri Mohan Kumaramangalam It follows that the argument founded on section 15 of the Act has to be negatived.

The only question that survives is whether the absence of Rules regulating the manner of division of the panchayat into wards has affected the legality of the election of the members to this panchayat As the controversy on this issue revolves round section 16 of the Act we will do well, to look at that section, which runs as follows :

" For the purpose of electing members to a panchayat, the Inspector shall after consulting the panchayat, if any, by notification, divide the village or town into wards and determine the number of members to be returned by each ward in accordance with such scale as may be prescribed "

Admittedly, no Rules were framed, prescribing the scale for the division of wards. How far does this absence of Rules divest the Inspector of his jurisdiction to effect a division envisaged in this section ? At the outset, it should be remembered that the prescribing of the scale is not compulsory It is only an enabling provision. If that were so, how could it be postulated that the omission to frame Rules would disable the Inspector to carry out his statutory duties ? This section makes it imperative for the Inspector to divide the panchayat into wards after consulting the panchayat and conformably to the scale if it is prescribed If the Government, which is the authority to make the Rules by virtue of section 178, fails to exercise that power in relation to this section, it could not be postulated that there could be no division of the panchayat into wards and elections to that panchayat based upon this division. The Government is under no obligation to make the Rules, as the language used in that section is one of mere permission. This, in our opinion, does not absolve the Inspector from discharging the duty which is of a mandatory nature. This is not a case of a power coupled with a duty, in which case it might plausibly be contended that the power could not be exercised without fulfilling the obligations cast upon the Inspector. In this position, it is futile to contend that, as the Inspector has to divide the village in accordance with any scale that might be prescribed by the Government, and, as the scale was not prescribed, he has no jurisdiction to effect that division.

Narendra Kumar and others v. *The Union of India and others*[1] cited to us by the learned Counsel for the petitioner does not lend any colour to the proposition advanced by learned Counsel for the petitioner. The main question that arose there was whether the restrictions imposed by the Non-ferrous Metal Control Order on dealers in non-ferrous metal could come within the saving provision of Articles 19 (5) and (6) of the Constitution It arose in a petition filed by three dealers in imported copper and carrying on their business at Jagadhri in the State of Punjab under section 32 of the Constitution for the enforcement of their fundamental rights. These persons entered into contracts of purchase of copper with importers of Bombay and Calcutta, and, before they could take delivery from the importers, the Government of India issued, on 2nd April, 1958, an Order called Non-ferrous Metal Control Order, 1958. Non-ferrous metal was defined in that order to mean :

" Imported copper, lead, tin and zinc in any of the forms specified in the schedule of the Order "

The price was controlled by clause 3 of that Order, which provided in sub-clause (1) that

" no person shall sell or offer to sell any non-ferrous metal at a price which exceed the amount represented by an addition of 3½ per cent to its landed cost "

and, in its second sub-clause, that ·

"no person shall purchase or offer to purchase from any person non-ferrous metal at a price higher than at which it is permissible for that other person to sell to him under sub-clause (1) "

Clause 4, which was designed to regulate the acquisition of non-ferrous metal by permit only, provided that :

1. 1960 S.C.J. 214 (1960) 2 S.C.R. 375.

"no person shall acquire or agree to acquire any non-ferrous metal except under and in accordance with a permit issued in this behalf by the Controller in accordance with such principles as the Central Government may from time to time specify."

The Central Government had not specified any principles to regulate the distribution and supply of commodities That being so, no permits could be issued to enable any dealer to deal in this metal. On the face of it, clause 4 of the Order read with the principles specified in the letter sent by the Government had the effect of completely eliminating the dealers from the trade in imported copper. It was also plain that, independently of clause 4, the fixation of price at which the copper could be bought and sold at 3½ per cent. above the landed cost had the effect of driving the dealer out of the business in imported copper, since the importer could charge 3½ per cent. from the dealer and the dealer was prevented from charging anything more than 3½ per cent. over the landed cost from the consumer. The position was, therefore, clear that, thenceforth, the actual consumer of the commodity would have to get it direct from the importer.

It is in that context that their Lordships of the Supreme Court observed thus at page 391 :

" . so long as the principles are not specified by the Central Government no permit can be issued by the Controller Enforcement of the provisions that no person shall acquire or agree to acquire except under a permit, would thus, so long as the principles are not specified in a legal manner as required by sub-sections (5) and (6) of section 3 of the Essential Commodities Act, would mean a total stoppage of the copper trade—not only of the transactions of dealers but of any transaction whatever in imported copper. On the face of it this could not be a reasonable restriction in the interests of the general public There is no escape therefore from the conclusion that so long as the principles are not specified by the Central Government by an Order notified in accordance with sub-section (6) and laid before both Houses of Parliament in accordance with sub-section (6) of section 3, the regulation by clause 4 as it is now worded is not within the saving provisions of Articles 19 (5) and 19 (6) of the Constitution, and is void as taking away the rights conferred by Articles 19 (1) (*f*) and 19 (1) (*g*)"

The situation is altogether dissimilar here. First of all, the fundamental right of the petitioner is not in any way affected. The electoral right, a violation of which may give a cause for complaint, is the right to vote and the right to stand as candidate at the elections It is not the case of the petitioner that the manner of the division of the village into wards has in any way affected either of these two rights. Moreover, the petitioners in the case cited above could not carry on business without a permit and the permit could not issue without the principles regulating the issue of a permit and distribution and supply of the commodities. But, under section 16 of the Panchayats Act, it is not the Rules prescribing the scales that enable the Inspector to effect the division. The Rules have a bearing only on the method of division. They do not bring into operation the duty to make the division for electing members to a panchayat. That being so, *Narendra Kumar and others* v. *The Union of India and others*[1] does not afford any analogy in this case and does not render any assistance to the petitioner.

On the other hand, there is a catena of decisions which support our view that absence of Rules does not vitiate either the division of the panchayats into wards or the election based thereon. In *Nemi Chand* v. *Secretary of State for India*[2], the question that was posed was whether the Collector had power to detain the goods, although no regulations were framed by the Governor-General in Council under section 19-A (2) of the Sea Customs Act, 1878, as amended by the Merchanise Marks Act, 1889. Section 19-A of that Act, omitting the unnecessary portions, reads as follows :

"(1) Before detaining any such goods as are or may be specified in or under section 18 or section 19, as the case may be, or taking any further proceedings with a view to the confiscation thereof under this Act, the Chief Customs Officer or other officer appointed by the Chief Customs Authority in this behalf may require the regulations under this section, whether as to information, security conditions or other matters, to be complied with, and may satisfy himself in accordance with those regulations that the goods are such as are prohibited to be imported.

1. 1960 S.C.J. 214 : (1960) 2 S.C.R. 375 2. (1907) I.L.R. 34 Cal. 511.

(2) The Central Government may make regulations, either general or special, respecting the detention and confiscation of goods, the importation of which is prohibited, and the conditions, if any, to be fulfilled before such detention and confiscation, and may by such regulations determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section and the mode of verification of such evidence "

In that case, no regulations were framed touching the manner and procedure of confiscation. In view of this, it was contended that the Collector could not act until and unless the Governor-General in Council had framed regulations under sub-section (2) of section 19-A This submission did not find favour with a Division Bench of the Calcutta High Court. They held that section 19-A gave only an enabling power to the Governor-General in Council to frame regulations and that it could not override the prohibiting language of section 18 or the implied power of detention under section 19-A.

Considering the same provision of law, a Division Bench of this Court in *Collector of Customs* v. *Gokuldoss*[1] ruled that the framing of regulations could not be read as a condition precedent to bringing into operation the powers and authority of the Customs Officers under sections 19, 167 (8) and 183. To a like effect is a judgment of Rajagopalan, J., in *Naina Mohd* v. *T P Board*[2] The learned Judge decided that the absence of rule for which a provision was made in the Village Panchayats Act (X of 1950) was not a condition precedent to the exercise of jurisdiction conferred under section 93 of that Act

In the same trend of thought is *Seoti Prasad* v *Raghubir Datt*[3] The point that was debated there was whether the President of the Municipality who was given power under section 69-A of the Municipalities Act to frame charges against the Executive Officer could exercise that power in the absence of Rules prescribing the manner in which that enquiry was to be conducted It was argued there that the power to conduct the enquiry was dependent on the framing of the Rules under sub-section (3) of section 69-A This contention was negatived by the learned Judge, who held that the power to conduct the enquiry arose under sub-section (1), that sub-section (3) only provided that the enquiry should be carried on in such manner as may be prescribed by the Rules and that the power belonged to the President independently of the Rules under sub-section 3 and the absence of Rules might expose the enquiry itself to further scrutiny, but, on that ground, it did not render the enquiry void We are in agreement with the view taken in these decisions.

The pronouncement of the Supreme Court in *Dargah Committee, Ajmer* v *State of Rajasthan*[4], is of considerable assistance in this inquiry The point that was presented before the Supreme Court was that the demand made by the municipality from the owner of the building for the expenses incurred in carrying out repairs to the building under section 222 (4) of the Ajmer-Merwara Municipalities Regulation VI of 1925 was ineffective, since the demand was not made in accordance with the manner prescribed by Rules as required by section 234 In that case, no Rules prescribing the form for making the demand were framed under the regulation. The argument based on the failure of the concerned authorities to make the Rule was that, unless the Rules were framed and the form of notice was prescribed for making demand under section 222 (1) no valid demand was made, and, therefore, an application could not be made under section 234. This argument was overruled by the Supreme Court in the view that the statutory power conferred on the Committee by section 222 (1) to make a demand was enforceable, notwithstanding the fact that no form was prescribed for issuing a demand notice We are satisfied that the principle enunciated in *Dargah Committee, Ajmer* v *State of Rajasthan*[4] governs the instant case

We are not persuaded that the formulation of Rules prescribing a scale is a prerequisite to the division into the wards by the Inspector. As stated earlier, the

1 (1955) 1 M.L.J. 422 : I.L.R. (1955) Mad 1248
2. A.I.R. 1956 Mad. 289.
3. A.I.R 1960 All. 273
4 (1962) 1 S.C.J. 583 : (1962) M.L.J. (Crl.) 321 (1962) 2 S.C.R. 265.

duty cast on the Inspector to divide the panchayat into wards is not dependent on the scale to be prescribed by the Government. That duty is cast in the earlier part of that section. The Rules do not create the jurisdiction to make a division. They bear only on the manner of division The only import of that section is that the Inspector is under an obligation to effect division irrespective of the existence or non-existence of the scale; in case Rules are framed, prescribing the scale, the division should be in accordance with that scale. It cannot, therefore, be postulated that the failure on the part of the Government to prescribe the scale absolves the Inspector from the duty he has to carry out under that section. If we give effect to this contention, section 16 would be reduced to a futility and might result in there being no elections to the panchayat. Since, as already indicated, that section only enabled the Government to make the Rules, and does not issue a mandate to the Government in that behalf, it was permissive for the Government to frame Rules for that purpose. If they did not make Rules, there could be no elections to the panchayats, if we adopt the construction suggested on behalf of the petitioner. We do not think we will be justified in putting a construction which would fail to achieve the manifest purpose of this legislation It could not be said that the omission to make the Rules has enabled the Collector to act arbitrarily For one thing, section 10 of the Act fixes the strength of the panchayat, and the division should be in relation to the strength prescribed under that section. The division has to be normally effected with reference to the area and population of each of the wards There is also the safeguard contained in the requirement to consult the panchayat before the division is actually made by the Inspector. That is not all This division by the Inspector is subject to the revisional jurisdiction of the Government under sections 157 and 158 of the Act. For these reasons, we reject the contention founded on section 16 of the Act.

There is another weighty reason why we should refuse relief to the petitioner in this case The division complained against was effected as far back as October, 1964, and elections took place on the basis of this division, the relators participating in these elections. That apart, the petitioner filed his nomination for Ward No. 13. Thus, not having sought to strike down the division by appropriate proceedings, the petitioner cannot, at this stage seek to nullify all the elections. In fact, he had acquiesced in the elections being conducted on the basis of the division of wards effected by the Inspector. It is, therefore, too late to make a grievance of the mode of division of the panchayat into wards It is not as if any of his fundamental rights has been violated It does not affect any electoral right of either the relator or any of the voters of the panchayat. Having proceeded on the assumption of the validity of the division of the panchayat village into wards, though cognizant of the alleged objection, it is not open to him at this stage to seek to render the elections void.

There is ample authority for this view of ours. In *Nain Sukh Das and another* v. *The State of Uttar Pradesh and others*[1], it was observed that as the alleged infringement of the fundamental rights of the petitioners under Article 15 (1) and Article 14 related to rights which they in fact never sought to exercise and for ascertaining which they took no steps while there was occasion for doing so, the petitioners were not entitled to relief under Article 32 of the Constitution The rule is similarly stated in *Achar* v *State of Madras*[2]. It was held there that a relator would not be entitled to information in the nature of a *quo warranto* if he had acquiesced in the election to which he later on objected, or if he was raising an objection which might have been put forward against himself at a previous election, or, while cognizant of the objection, he voluntarily so acted as to enable the respondent to exercise the office Similarly, in *Kutumba Rao* v. *Pamdeswara Rao*[3], a Division Bench of the Andhra Pradesh High Court decided that, where a person took part in the elections at all stages without raising any objection, he could not question the validity of

1. (1953) 2 M L J 257· (1953) S C R 1184 102
1953 S C J 546
2. I.L R (1954) Mad 908 : (1954) 1 M L J. 38
3 (1961) 2 And W.R. 327.

the elections subsequently under Article 226 of the Constitution. So, on this ground also, the petition should fail.

In these circumstances, we see no justification to issue the writ asked for The writ petition is accordingly dismissed with costs.

V.K. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

C. M. V. Krishnamachari .. *Petitioner**

v.

M. D. Dhanalakshmi Ammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 1, *rule* 10 (2)—*Scope—Words 'all questions involved in the suit'—Meaning of—Suit for partition of joint family properties—Agreement for sale of one of the properties involved in such suit, executed by a coparcener in favour of a stranger—Part of purchase money received—Stranger if can be impleaded as party to partition suit under order* 1, *rule* 10 (2).

Transfer of Property Act (IV of 1882), *section* 55 (6) (*b*)—*Scope*

The plaintiffs filed a suit against the defendant for partition of their joint family properties The petitioner filed an application for impleading himself as a supplemental defendant in the suit on the ground that prior to the institution of the partition suit the defendant had entered into a written agreement to sell a house claiming it to be his self-acquired property and had also received Rs 9,000 as part of the consideration In the partition suit the plaintiffs claimed this property as the joint family property The petitioner wanted himself to be impleaded to prevent any possible collusion between the plaintiffs and the defendant and to protect his interests. The lower Court refused to implead the petitioner. On the question whether he should have been impleaded as a proper party

Held, it was a case where the petitioner ought to have been impleaded as a supplemental defendant under Order 1, rule 10 (2) of the Civil Procedure Code

The language employed in Order 1, rule 10 (2) confers upon the Court a very wide jurisdiction. It is neither feasible nor advisable to lay down any exhaustive statement of the principles governing the exercise of this discretionary power within the *strait jacket of an inflexible formula*

The contention that the words '*all questions involved in the suit*' occurring in Order 1, rule 10 (2) can only be questions as between the parties to the litigation and not questions between any of the parties to the suit and a third party, cannot be accepted. The said words should receive a wider interpretation so as to embrace questions between the parties to the suit and even third parties in proper cases.

In the present case the allotment made in the partition suit would be binding upon the petitioner. He has a real, direct, tangible interest in the subject-matter of the suit and undoubtedly his presence is necessary to enable the Court to effectually and completely adjudicate upon the points in controversy.

The interest that is necessary to make a person a party is legal interest including equitable interest, that is an interest which law would recognise and uphold Surely it cannot be contended that law would refuse to recognise and uphold rights which would accrue under an executory agreement of sale.

The matter can also be looked at from one other aspect Under section 55 (6) (*b*) of the Transfer of Property Act the buyer is entitled to a charge on the property as against the seller and all persons claiming under him to the extent of the seller's interest in the property for the amount of any purchase money properly paid by the buyer. In this case even if it should be held that the property in dispute was joint family property, the petitioner would be entitled to a charge for the sum of Rs 9,000, the prepaid purchase price, on the share of the defendant either in the property agreed to be sold or any other property that may be allotted to the defendant at the partition That would constitute sufficient ground to entitle him to be impleaded as a party

The contention that the petitioner by his application is converting the suit for partition into a suit for specific performance without the payment of any Court-fee is misconceived He is impleaded only for the limited purpose of establishing that the property is the separate property of his vendor or alternatively for suggesting to the Court that without prejudice to the plaintiffs the property agreed to be sold may be allotted to the defendant

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Subordinate Judge of Madurai, dated 4th August, 1964 and made in Interlocutory Application No. 501 of 1964 in Original Suit No. 51 of 1963.

R. Rangachari and *P Viswanathan*, for Petitioner.

R. Gopalaswamy Iyengar, and *K N. Balasubramaniam*, for Respondents.

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*C R P. No 43 of 1965. 16th April, 1965.

The Court made the following

ORDER.—This revision petition is against the order of the learned Subordinate Judge of Madurai, dismissing the application which the petitioner herein filed for impleading himself as a supplemental defendant in a partition suit, Original Suit No. 51 of 1963. Respondents 1 and 2 herein are plaintiffs in the said suit while the third respondent, M. K. Sundararama Iyer, is the first defendant against whom partition was claimed. The petitioner's case in support of his application was that the first defendant M. K. Sundararama Iyer, had entered into a written agreement of sale, dated 6th September, 1962 with the petitioner, agreeing to convey a house in Madurai Town (one of the items involved in the suit for partition) for a sum of Rs. 29,000 and in pursuance of the agreement a sum of Rs. 9,000 had been paid by the petitioner to Sundararama Iyer aforesaid who had agreed to convey the property and execute the registered deed of sale within three months from the date of the agreement of sale. The petitioner's case was that the agreement of sale was entered into by Sundararama Iyer aforesaid making the express representation, both oral and under the express terms of the agreement of sale, that the property agreed to be conveyed is his own self-acquired property. As the plaintiffs in the partition suit are claiming the property as joint family property and as the petitioner apprehends collusion between the plaintiffs and the first defendant he sought to be impleaded as a party to prevent any collusion and also to bring to the notice of the Sub-Court his rights under the agreement of sale, so that in equity the property agreed to be sold, may if possible be allotted to the share of the first defendant. The plaintiffs alone filed an objection statement, opposing the application; the first defendant did not file any objection statement denying the allegations made by the petitioner concerning the written agreement of sale. The learned Subordinate Judge dismissed the application taking the view that the agreement of sale did not clothe the petitioner with any legal or equitable right and that the remedy of the petitioner is only to file a suit for specific performance, and that the same should be done in an independent suit and no relief could be granted to him in the partition suit. Hence the present revision petition by the petitioner.

I have no doubt that the Order of the learned Subordinate Judge is clearly wrong and cannot be sustained. I am of the view that this is a case in which the petitioner ought to have been impleaded as a supplemental defendant by the Court exercising its powers under Order 1, rule 10 (2) of the Civil Procedure Code. Before I proceed further it is necessary to set out the relevant provision, Order 1, rule 10 (2), Civil Procedure Code:

> "The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, *or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions* involved in the suit, be added."

It is not claimed that the petitioner is a person who ought to have been joined as a necessary party to the suit, and the only question is whether he could be impleaded as a party whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle the questions involved in the suit.

Learned Counsel on both sides relied upon some of the decisions which have considered the ambit of the power of the Court in impleading a person as a proper party to the suit and explained the proper meaning of the words *all the questions involved in the suit*. The decisions illustrate a variety of instances when intervention by way of impleading of parties has been allowed and when refused and from those decisions it is neither feasible nor advisable to lay down any exhaustive statement of the principles governing the discretionary power of the Court within the *strait jacket of an inflexible formula*. One thing, is however, quite clear that the language employed in the rule confers upon the Court a very wide jurisdiction, and I am not disposed to a curtailment of the powers more than what is expressly decided by judicial decisions

binding upon me. As observed by Jackson, J., in *Chidambaram Chettiar* v. *Subramania Chettiar*[1].

> " A Court has large discretion under this Order, and I should deprecate any attempt to diminish that discretion by substituting special pronouncements in special cases for the actual language of the rule "

Mr Gopalaswamy Iyengar, learned Counsel for the respondent, contended that the petitioner is not a necessary party nor a proper party whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. According to learned Counsel the plaintiff is the *dominus litus* and he cannot be compelled to litigate not only against the defendant of his choice as against whom he has prayed for certain reliefs but also against the petitioner, and that the expression, *all the questions involved in the suit* can mean only the questions or disputes as between the parties to the litigation and will not include a question or dispute between one or more of the parties and a third party. He further urged that the alleged agreement of sale in favour of the petitioner does not create any interest in immoveable property, and that the petitioner's remedy is only to enforce his rights in a suit of his own for specific performance against the first defendant, and work out his rights according to Hindu Law either as against the very property if it is allotted to the alienating coparcener or as against any other property which may be allotted to him. He objects that the records should not be loaded with parties in whose favour no interests in immoveable property have been created either by way of sale or mortgage, and that the petitioner cannot be impleaded so as to complicate the suit by simultaneous investigation of totally unconnected disputes and issues. Finally he urged that the fact that the petitioner may be or is also interested in establishing that the property is the self-acquired property of his vendor, the first defendant, is not a sufficient ground to entitle the petitioner to be impleaded as a party, and that the rule which applies to a purchaser in whose favour a sale deed has been executed and registered cannot apply to a person who has only got a mere agreement of sale in his favour. Learned Counsel drew my attention to several cases of this Court which have dealt with and discussed the precise nature of the right which accrues to a person who enters into any dealing with a coparcener of a joint family in regard to any item or items of joint family properties It is unnecessary to refer to those decisions as the principles are well established and it is sufficient to refer to the statement of the law in Mulla's Hindu Law, Twelfth edition, page 393, section 261, sub-sections (3) to (8) and Mayne's Hindu Law, Eleventh edition, page 487, section 386, page 489, section 388 and page 494, section 392 and section 393.

Reference however, must be made even at the outset to the Full Bench judgment in *Issaku* v. *Seetharamaraju*[2], in which it was held that where one of several co-sharers purports to mortgage a specifi item of property to which all of them are jointly entitled the mortgagee would be entitled to proceed against the properties that may be allotted to the mortgagor in a partition amongst the co-sharers at which the item mortgaged however is allotted to some other co-sharer but some other item is allotted to the mortgagor Rajamannar, J , as he then was, delivering, the judgment of the Full Bench laid pointed emphasis that it would be incorrect to say that when a co-sharer purports to alienate a specific item of joint *family property, he is dealing with the property to which he had no title at that time, but that he certainly had title*, the interests of an undivided co-sharer. The learned Judge also observed that the mortgagee's right is not a mere personal right or a personal equity, but that the right to proceed against the substituted security is a *charge* within the meaning of section 100 of the Transfer of Property Act, even though it may not amount to a mortgage because of the fact that it is only by operation of law the mortgage right gets transferred over the substituted security

Mr Gopalaswamy Iyengar does not dispute the position that in a suit for partition alienees of joint family properties may be made parties at the instance of parties.

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1. (1927) 53 M.L.J 269, 270.
2 (1948) 1 M.L.J 322 : I L.R. (1948) Mad. 454, 478 (F.B.).

other than the plaintiff as their presence may be necessary to enable the Court to effectually and completely dispose of the subject-matter in a suit, namely, a just and equitable partition of the family properties Reference may be made to the decision in *Moonrumugankondan Asari* v *Chockalingam Asari*[1].

At this stage reference may also be made to the decision of the Privy Council in *Jadu Nath Ray* v. *Parameswar Mallik*[2], in which the Privy Council has observed, adverting to the practice in Bengal, that a mortgagee of an undivided share, though not a necessary party in a suit for partition, could be allowed to attend and be heard at the stage of the actual division and allotment of properties by metes and bounds on the ground that he is a person interested in that result, and that he would be prejudiced if his mortgagor did not receive a proper allotment, either the same property if possible, or some other equivalent It may be noted that in that case the mortgagee did not apply to be impleaded in the partition suit in the earlier stages, and certain legal complications had arisen, as the mortgagee, during the suit for partition had himself filed a suit on the mortgage, obtained a decree and the mortgaged properties were sold in execution Further, there were also prior orders and Court proceedings delimiting the rights of the mortgagee and in what manner his rights were to be safeguarded There can be no doubt about it that simple mortgagees of specific items of family properties though not necessary parties are proper parties to the suit for partition *Vide* Mulla's Hindu Law, Twelfth edition, page 510 as to who are necessary and proper parties in a suit for partition.

In *Sadu Bin Raghu* v *Ram Bin Govind*[3], a Bench of the Bombay High Court has observed that in a suit for partition all persons interested in the property to be divided must be brought before the Court, and that a purchaser or a mortgagee from a coparcener is a proper and even a necessary party to a suit for partition. The right of an alienee from an individual coparcener, whether a purchaser or a mortgagee, is no doubt a mere equity to have the property alienated allotted to the share of the alienating coparcener, even so if a partition had taken place without impleading the alienee the partition would be binding upon the alienee only so long as it is not vitiated by fraud or collusion Law also recognises a right in such an alienee, even a mortgagee, to successfully challenge the partition (to which he had not been made a party) on the ground of fraud or collusion The position therefore is that a mortgagee or a person who has got a mere charge by operation of law to proceed against the substituted property could undoubtedly be impleaded as a party, at any rate, when he seeks to come on record. The crux of the question in the instant case is why this principle should not apply to a person who has got an agreement of sale in his favour just because such an agreement is merely executory and does not create an interest in immoveable property.

Mr. Gopalaswamy Iyengar, relying upon the decision of V V. Srinivasa Ayyangar, J., in *Sri Mahant Prayaga Doss* v *Board of Commissioners for Hindu Religious Endowments, Madras*[4], contended for the narrow view that *the questions involved in the suit* under Order 1, rule 10, Civil Procedure Code can only be questions as between the parties to the litigation and not questions between any of the parties to the suit and third party even though touching the property which is the subject-matter of the suit. But this Court has consistently adopted a wider interpretation of the scope of Order 1, rule 10 and in the state of the authorities his contention cannot be accepted.

In *Vydianada* v. *Sitarama*[5], a Bench decision of Turner, C J, and Muttuswami Ayyar, J., the question arose under section 32 of Act X of 1877, corresponding to Order 1, rule 10, Civil Procedure Code of 1908 In that case in a suit by the plaintiff to enforce a bond executed in his favour, the executant contended that the plaintiff and his uncle were members of a joint family that the bond was taken in the name of the plaintiff on behalf of the joint family, and that he had made a part payment to the plaintiff's uncle The uncle supported the case of the defendant and sought

1 (1930) 59 M.L J 524 : I.L R. 54 Mad 5 (F B).
2. (1940) 1 M L J 97 · L R. 67 I A. 11 : I.L.R. (1940) 1 Cal. 255 (P.C).
3 (1892) I L R 16 Bom 608
4 (1926) I.L R 50 Mad. 34
5. (1881) I L R 5 Mad. 52, 53.

to be impleaded as a party The plaintiff's objections thereto were overruled and the uncle was impleaded as the second defendant. Dealing with the scope of the rule the matter was put thus .

"The decision of the objection to the order of the Court below turns on the meaning of the words in section 32 of the Code of Civil Procedure, 'whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the question involved in the suit'

Is it meant by these words that a person not originally impleaded is to be made a party only if the questions raised in the suit cannot otherwise be completely and effectually determined between the parties to the suit ? Or is it meant completely and effectually *determined so that they shall not be again raised in that or in any other suit between the parties to the suit or any of them and third parties* ? To accept the more restricted interpretation involves the addition of words which we do not find in the section, namely, "*between the parties to the suit*", and there can be few, if any, questions which cannot be determined between the parties to the suit one way or the other, and of which the determination, if they be material, will as between the parties to the suit, not be final On the other hand, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit, and finally and effectually to put an end to litigation respecting them. No better instance of the wisdom of such a rule could be afforded than is presented by the suit before the Court If the respondent be not made a party and the appellant succeeds, the first defendant is liable to be called upon to pay the debt twice over, *viz*, in this suit, as a debt due to the appellant personally, and, in Original Suit No 60 of 1880, as a debt due to the coparceners, and he will lose in this suit the benefit of the part payment, it is alleged, he has made, while in the other suit he may establish he is entitled to it Reading the whole of the Rules under Order 16 of the Judicature Act together, it seems clear that rule 13 should be interpreted in the larger sense Although *Ex parte Smith In re collie*[1] and *Bower* v *Hartley*[2] were decided on rules 17, and 18, they indicate the principle, we believe, the framers of the rules had in view, namely, that a material question common to the parties and to third parties should be tried once for all (italics mine) "

The principle of this decision was followed and applied by Venkatasubba Rao, J., in *Secretary of State* v. *Murugesa*[3] In that case the plaintiff was elected a member of the District Board of Chingleput But the Government withheld the notification of the plaintiff's election in the Gazette. The plaintiff, therefore, filed a suit against the District Board for a declaration that he was a duly elected member and the Government applied for being joined as a defendant in the suit Even though both the plaintiff and the defendant opposed the application the Government was impleaded as a party as the subject-matter in dispute concerned the power of the Government to suspend the execution of the resolution of the Taluk Board The learned Judge expressly dissented from the narrow view of Srinivasa Ayyangar, J , in *Sri Mahant Prayaga Doss* v *Board of Commissioners for Hindu Religious Endowments, Madras*[4], on the ground that it was not only opposed to the plain language of the section, but also to the Bench decision of this Court in *Vydianada* v. *Sitarama*[5].

In *Sivarama Pillai* v. *Ganesa Rathnam Pillai*[6], the same wider interpretation was adopted, applying the principle of the decision in *Vydianada* v. *Sitarama*[5], and *Pitchayya* v. *Rattamma*[7]. In that case a purchaser had filed a suit for possession against his vendor and a tenant A third party applied to be made a party to the suit alleging that the vendor had no right to sell the whole property, and that he, the third party, was entitled to a half share. The third party had also filed a suit against the purchaser the vendor and the tenant claiming a half share in the property. It was held that the proper course was to join the third party as a party to the suit for possession in order that the Court might properly work out the rights as between the parties to the suit and the third party and thus avoid possible conflict of decisions

In *Anjaneya Sastri* v. *Kothandapani*[8], a Bench decision of this Court Varadachariar, J., delivering the judgment on behalf of the Bench has emphasised that the rules relating to the joinder of parties are based on the principles of avoiding multiplicity of suits, not merely to avoid waste of time and money, but also to prevent possible conflict of decisions, and that to justify the impleading of a party, it is not necessary that he should be interested in all the reliefs or all the questions arising between the plaintiff and other defendants

1. (1876) L R 2 Ch D 51.
2. (1876) L R. 1 Q B D 652.
3. A I R. 1929 Mad 443.
4. (1926) I L.R. 50 Mad. 34.
5. (1881) I L R 5 Mad 52.
6. A.I R 1935 Mad 353
7. (1928) 55 M L J 856.
8. A I.R. 1936 Mad. 449.

In *Meyyappa Chettiar* v. *Seethai Achi*[1], Venkataramana Rao, J, has applied the wide interpretation of the rule adopted in the decision of Turner, C J, and Muttusami Ayyar, J. After quoting the observations of Turner, C J, therein the learned Judge observed as follows at page 284 —

" The underlying principle regarding the addition of parties is that there must be *finality to litigation* and to secure that purpose it would be incumbent upon the Court to add a party whose presence would be necessary to put an end to all the controversy in the litigation finally This is the view taken by a Division Bench of this Court in *Seethai Achi* v *Meyappa Chetti*[2] in this very case where Sundaram Chetty, J, relying on *Vydianada* v *Sitarama*[3] observed

'But if there is a question *common to the parties on record and a stranger, as regards the subject-matter* of the suit or *any portion thereof*, it should be tried once for all by allowing the stranger to be made a party

This is also the view taken by Venkatasubba Rao, in *Secretary of State* v. *Murugesa*[4]. This in my view would be the correct interpretation of the rule."'

In *Vanjiappa Goundan* v. *Annamalai Chettiar*[5], Patanjali Sastri, J., has following *Secretary of State* v *Murugesa*[4], held that *questions involved in the suit* referred to in Order I, rule 10 meant not only the questions involved in the suit as originally framed between the parties to the suit but also any dispute between the parties to the suit and a third party, and that the object of the provision is that where several disputes arise out of one subject-matter all the parties interested in such disputes should be brought before the Court and all questions in contest between them should be completely settled in the action The principle of the decision in *Vydianada* v *Sitarama*[3], and the decision of Venkatasubba Rao, J., referred to earlier were followed by Kunhiraman, J., in *Mangacharyulu* v *Krishnamacharyulu*[6]. In that case a third party claimed certain rights jointly with one of the plaintiffs and denied the title of the other plaintiffs and therefore applied for being impleaded as a party to the suit. The plaintiffs resisted the application on the ground that if such a third party is impleaded it would necessitate a triangular fight about title and would have the effect of converting and completely altering the character of the suit from one in ejectment into a suit based upon title The trial Court over-ruled the objections and impleaded the third party This view was affirmed by the High Court on the reasoning that *questions involved in the suit* should receive a wider interpretation so as to embrace questions between the parties to the suit, and even third parties in proper cases.

In *Paramasivam* v. *Adilakshmi*[7], this Court has again taken the view that the language in the section should be interpreted in a liberal and wide manner that persons should be made parties to a suit if such a course would ensure a final and complete adjudication of the points involved and avoid multiplicity of proceedings.

Reference must now be made to the decision of the Supreme Court in *Razia Begum* v. *Anwar Begum*[8], in which the scope of Order I, rule 19, Civil Procedure Code, came up for consideration In the judgment of the Supreme Court there is reference to the narrow view taken by Srinivasan Ayyangar, J, in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[9], and the wider view taken by this Court in *Vydianada* v *Sitarama*[3], and *Secretary of State* v. *Murugesa*[4]. But the question as to which view is the sounder one, was left open as the Supreme Court took the view that, even on the narrow view of the rule the third party was rightly impleaded as a party to the suit. In that case the plaintiff had filed a suit claiming that she was the legally wedded wife of the defendant and she was entitled to receive from the defendant a sum of rupees two thousand as *kharch-e-pandan*. The defendant admitted the claim A third party filed an application for impleading herself and her son on the ground that she was also the legally wedded wife of the defendant, and that she was interested in denying the marriage of the plaintiff with the defendant Sinha and Kapur, JJ. (Imam J, dissenting) held that the third party was rightly impleaded The judgment of the Supreme Court contains a

1 (1937) 2 M L J 279.
2 (1934) 66 M L J. 517 I L.R. 57 Mad 892, 917.
3. (1881) I.L R 5 Mad 52.
4. A I.R. 1929 Mad 443.
5. (1939) 2 M L J. 551.
6. A.I.R. 1940 Mad. 225.
7. (1952) 1 M L J 473 : A I.R. 1953 Mad 618
8 (1958) 2 M L J. (S C) 193 (1958) 2 An W.R (S.C) 193 (1958) S C J. 1214: (1959) S C R. 1111.
9. (1926) I.L.R. 50 Mad. 34.

reference to some of the leading decisions in England which had been rendered under the corresponding provision of the rules of the England Supreme Court Order 16, rule 11 containing identical language. The Supreme Court has referred to, with approval, the view taken in the English decisions that in order that a party may be added as a defendant in the suit he should have a legal interest in the subject-matter of the litigation and that the legal interest is not an interest as distinct from an equitable interest but an interest which the law recognises and that that person who would be only merely indirectly or commercially affected in the result of the litigation cannot be impleaded as party as a person having a direction interest in the subject-matter in dispute. The Supreme Court observed as follows at page 1123 :

"There cannot be the least doubt that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit he should have a direct interest in the subject-matter of the litigation whether it raises questions relating to movable or immovable property"

At this stage I may refer to two recent decisions in England. The first is *Dollfus* v. *Bank of England*[1], in which the precise nature of the interest of the party sought to be impleaded in the property in dispute was pointed out so as to justify his being impleaded as a party under Order 16, rule 11. Rules of the Supreme Court, corresponding to Order 1, rule 10. In that case sixty-four identifiable gold bars belonging to a French Company were looted by the Germans during the War on their occupation of France and were later seized by the Allied armies The custody of the gold bars were acquired by a tripartite commission, consisting of the representatives of the Governments of United Kingdom, United States of America and France for the purpose of eventually distributing, in accordance with the provisions of the Treaty, the gold and treasure looted by the Germans. The gold bars were conveyed to England and deposited by the commission with the Bank of England The French Company instituted an action against the Bank claiming delivery of the gold bars The Bank applied for an order to set aside the writ on the ground that the two foreign Governments, United States of America and France had declined to submit to the jurisdiction of the English Courts. The claim of the Company was upheld and leave was given to the Bank to appeal to the House of Lords At that stage the two Governments, United States of America and France applied to be added as defendants to the action It is significant to note that in that application the applicants did not assert a title to the bars but they urged that if they should establish that they had possession or control of the bars through the Bank the French Company would fail to obtain an Order from the Court, in its favour by reason of the doctrine of immunity applicable to foreign sovereign States and, therefore, the applicants, the Governments of United States of America and France would be entitled to retain possession and control over the bars and thus be able to dispose of them. It was held that whether or not the *applicants had a proprietary right in the subject-matter of the action* sufficient to entitle them to be joined as defendants the true test lay not so much on an analysis of *what were the constituents of the rights but rather in what would be the result on the subject-matter of the action if their rights could be established.* It was also held that the applicants had a direct interest in the subject-matter of the action which was similar *to a proprietary right and was of such a nature as would entitle them* to be joined as defendants as in their absence their claim could not be eventually put forward. After referring to the decision in *Moser* v *Marsden*[2], in which it was held that the fact that a person's interest would be commercially affected by a judgment would be insufficient to make the person a party, and that that person should be directly interested in the subject-matter in dispute, Wynne-Parry, J , observed as follows at pages 611-612 :

"On the other side of the line is *Vavasseur* v *Krupp*[3], to which I have already referred, which established that a proprietary right of the proposed defendant in the subject-matter of the action is sufficient. The question here is · On which side of the line does this case fall ? For the purposes of this application, the applicants do not assert a title to the property in question, and, therefore, it cannot be asserted that they have a proprietary right, as that phrase is used in *Vavasseur* v. *Krupp*[3]. What they assert is that, if they can establish that they have possession or control of the property in question through the defendant bank, then, by virtue of the doctrine of immunity which applies to foreign sovereign States,

1. (1950) 2 All E R. 605.
2. L.R. (1892) 1 Ch. 487.
3. L.R. (1878) 9 Ch. D. 351.

two results might well follow, (i) the plaintiffs must fail to obtain any order from this Court in their favour, and (ii) the applicants will retain the possession and control over the remaining bars of gold, and will be able to dispose of them In other words, although the applicants did not assert title to the bars of gold, the result of a successful intervention by them would be that, *as between the plaintiffs and themselves, they would, for all practical purposes, be the owners* It seems to me that the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established That is the approach which I have made Viewing the matter in this way, it is impossible, in my judgment, to say that the applicants have only an indirect interest of the nature which fell to be considered in *Moser* v *Marsden*[1]. They appear to me to have something more, namely, a right, which, although it may arise indirectly, *viz*, by the invocation of the doctrine of immunity and through the defendant bank as bailee, nevertheless *results in a direct interest in the subject-matter of this action, and is a right nearly akin to the proprietary right which was under consideration in Vavasseur* v *Krupp*[2] There is no authority directly bearing on the point, but, on the analysis which I have made of the nature of the applicant's interest in the matter, I have come to the conclusion that I ought not to say that I have no jurisdiction to entertain the application on the short ground which counsel for the plaintiffs put forward, *viz*, that the applicants could not show a proprietary right, and, therefore, did not come within the second of the three classes of cases to which I have referred, but that I am dealing with a right of such a nature as, on an application by applicants in the position of the present applicants, should result in an order that they be joined as defendants provided it can be shown that in their absence the claim to the right will not effectually be put forward "

This view was followed in *Amon* v *Raphael Tuck & Sons, Ltd*[3]. In that case the plaintiff filed an action against the defendants for damages and injunction on the ground that the plaintiff was the first inventor of a new design of adhesive dispenser in the shape of a pen, that the plaintiff disclosed to the defendant the details of the invention in the course of negotiations with the defendant for marketing the pen, and that the defendant had wrongfully made use of the information by manufacturing an adhesive dispenser of the same design as invented by the plaintiff The defendant while resisting the claim applied under Order 16, rule 11, Rules of Supreme Court to join as defendant a third party, urging among other things that the third party was the first inventor of the adhesive dispenser It was held that the presence of the third party was necessary to enable the Court to adjudicate completely the subject-matter in dispute as the enjoyment of the legal right of the third party would be curtailed by the relief asked for by the plaintiff in the action Devlin, J, explained the scope of the rule in these terms at page 279

"It is not, I think, disputed that "the cause or matter" is the action as it stands between the existing parties If it were otherwise, then anybody who showed a cause of action against either a plaintiff or defendant could, of course, say that the question involved in his cause of action could not be settled unless he was made a party Counsel for the defendants does not contend for so wide a construction as that, but he submits that, if the intervener has a cause of action against the plaintiff relating to the subject-matter of the existing action, the Court has power to join the intervener so as to give effect to the primary object of the order, which is to avoid multiplicity of actions In the present case he submits that the subject-matter of the dispute between the existing parties is the "ownership", if I may so put it, of an invention, the plaintiff claims that he is the owner of it and the intervener alleges that he is, and both disputes ought to be determined at the same time This construction stresses the amplitude of the closing words of the passage which I have just cited from Order 16, rule 11, "all the questions involved in the cause matter"

The alternative construction treats the opening words as dominent "All the question involved" is a phrase that, unless it is cut down, would be impossibly wide It is cut down, the plaintiff submits, by the opening words of the passage which I have cited The intervener must be a party whose presence is necessary to enable all questions in the action to be adjudicated on and settled, but the question must be one which has to be adjudicated on in the issue between the existing parties and not in any new issue raised by an intervener The criticism that at once suggests itself of this construction is that it is impossibly narrow If the adjudication is limited to something that lies between the plaintiff and the defendant, what parties can be necessary to it except the plaintiff and the defendant? The Court is for this purpose concerned only with action *in personam* and in such actions either the necessary defendant is sued or the action fails If all the parties who "ought to have been joined" under the first limb of the rule are joined, who are the "necessary parties" contemplated by the second limb?"

Devlin, J, further observed as follows at page 289-290

"Counsel for the plaintiff next submits that the intervener's interests cannot be affected, any way because if the plaintiff is wrong, there will be no injunction, and if he is right, the injunction can be granted only on the basis that the duty of confidence was owed to the plaintiff and not to the intervener This argument, in my opinion, misconceives the point Whenever a plaintiff seeks to restrain a defendant from dealing with his property and an intervener claims that the property is his, the plaintiff can say "If I am wrong I shall not get an injunction and the intervener's rights will not be affected,

1. L R (1892) 1 Ch. 487
2. (1878) L R. 9 Ch. D. 351.
3. (1956) 1 All E R. 273.

if I am right the intervener has no right to be affected anyway " The point is that the intervener is entitled to be heard on the issue whether the plaintiff is right or wrong so that he may be bound by the order made

The final submission of Counsel for the plaintiff is more far-reaching than the others He submits that the action and the intervener's claim are concerned with rights in contract and not rights of property, and, therefore, the case does not come within the term " proprietary rights " as set out in the note in the ANNUAL PRACTICE, 1955 at page 232 I am not, of course, required to construe that phrase as if it were contained in a statute If I were I should see no reason why rights under a contract should not be called proprietary rights just as much as rights to physical property The phrase, however, is not used definitely The three categories formulated in the note are not exhaustive Indeed, I do not think that they should be treated as having been formulated independently There is one common principle running through them all, and, for my part, I should prefer to apply a test based on that principle rather than to enquire whether the case to be determined falls into one or other of the three classes There is not, for example, any real distinction between the case which related to specific performance and those which related to proprietary rights As WYNN-PARRY, J, said in *Dollfus* v *Bank of England*[1]

' It seems to me that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established '.

I respectfully agree with that I think that the test is ' May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights ? '

It may be true, as Counsel for the plaintiff submits, that the authorities so far have been dealing with rights to physical property, but, in my judgment, the principle applies equally to contractual rights I think that in this case the test is satisfied, that I have jurisdiction to make the Order and that is one which having regard to the question involved in the action, it is proper that in the exercise of my discretion I should make "

The principle of this decision may well be applied to the instant case The allotment made in the partition suit would be binding upon the third party applicant, and yet he is totally denied the opportunity of placing his point of view to have the property agreed to be sold to him allotted to the share of the alienating coparcener if possible and without prejudice to the rights of the other co-sharers It is needless to observe that if there is no collusion or fraud the partition would be binding upon the third party, and his interests would therefore be bound and affected by the final decree in the partition suit It should be noted that this aspect is independent of any question of fraud or collusion vitiating the allotment in the partition suit The applicant has a real direct tangible interest in the subject-matter of the suit and undoubtedly his presence is necessary to enable the Court to effectually and completely adjudicate upon the points in controversy

There is also one other important aspect that should be borne in mind The plaintiffs claimed the property as joint family property, and any decision rendered therein would not affect the rights of the petitioner, the third party applicant He can always file the suit for specific performance and recover possession of the property from his vendor as well as the plaintiffs even if the properties are allotted to the plaintiff provided the petitioner establishes that the properties are the self-acquired separate properties of the first defendant The question of the character of the property will have to be decided in two litigations, in both of which the plaintiff will be a party It is obvious that such a course would result in unnecessary multiplicity of proceedings and would also be exposed to the mischief or risk of conflicting decisions on the identical matter in dispute when common sense and convenience demand that there should be a single conclusive final decision Further the record shows that the first defendant-vendor is indifferent, whether due to fraud or collusion as alleged in the application or for no apparent reason In such a situation it is obvious that this question of the character of the property, whether joint family property or the separate property of the first defendant, should not be decided in the absence of a person whose interests are vitally affected by the adjudication It will be a sheer waste of time and might result in futile useless proceedings if later on, as observed earlier, the applicant establishes that the properties agreed to be sold to him are not joint family properties I do not see any reason why such a restricted interpretation of Order 1, rule 10, Civil Procedure Code, should be adopted as contended for by the learned Counsel for the respondent which may result in such absurd anomalous consequences

1. (1950) 2 All E.R. 605, 611.

Mr R Gopalaswami Iyengar relied upon the following observations in the Full Bench decision of this Court in *Baluswami Aiyar* v *Lakshmana Aiyar*[1], at page 625 :

> " The view that the alienee from a coparcener becomes a tenant-in-common with the other coparceners has not been accepted in the decisions I have referred to, and it is now settled that the alienee of a share has only an equity to work out his rights by partition Having regard to the fact that the alienation of a share by a coparcener without the consent of the others is opposed to the spirit of the joint family system, and that it places the other members in a disadvantageous position as the alienor still remains a member of the joint family while conveying his share as also to the fact that it gives the right to an alienee of a small item of family property to disrupt the family by filing a suit for general partition, I do not think Courts ought to put a person whose claim rests on a purely executory contract in the position of a person who by reason of an executed conveyance and the payment of consideration has acquired rights which on equitable grounds Courts consider it desirable to work out in a suit for partition "

in support of his contention that entirely different considerations would apply to a mere executory contract of sale This observations have no relevance on the question of the applicability of Order I, rule 10 where the only question is whether the applicant has got a direct interest in the subject-matter in dispute which would be affected by the result of the litigation *The interest* that is necessary to make a person a party is legal interest including equitable interest, that is an interest which the law would recognise and uphold Surely it cannot be contended that law would refuse to recognise and uphold rights which would accrue under an executory agreement of sale

In this connection reference may be made to the Bench decision of this Court in *Saradambal* v *Kandasamy*[2], which had to construe the words *any interest* occurring in Order 22, rule 10, Civil Procedure Code In that case the question arose whether a person who has obtained an assignment of a right to obtain specific performance could be said to have acquired any interest within the meaning of Order 22, rule 10, Civil Procedure Code so as to be impleaded as a party It was held that the words *any interest* includes any transferable right to sue The contention that *any interest* referred to an interest in tangible interest was not accepted

In a recent decision of the Andhra Pradesh High Court in *V Narasimha Raju* v. *K Yellamanda*[3], this decision was followed while applying Order I, rule 10, Civil Procedure Code at the instance of a person who had obtained an agreement of sale and had obtained also possession of the property.

The matter can also be looked at from one other aspect Under section 55 (6) (*b*) of the Transfer of Property Act the buyer is entitled to a charge on the property as against the seller and all persons claiming under him to the extent of the seller's interest in the property for the amount of any purchase-money properly paid by the buyer provided the purchaser has not improperly declined to accept delivery. In this case even if it should be held that the property was joint family property and the agreement of sale would not bind the interest of the plaintiffs the applicant would undoubtedly be entitled to a charge for the sum of Rs 9,000 the pre-paid purchase price on the share of the first defendant either in the property agreed to be sold or in any other property that may be allotted to the first defendant at the family partition

The law on this matter is well settled and it is sufficient to refer to two recent decisions of the Bombay High Court In *Abdul Hamid Khan* v *Mohomed Ali*[4], it was held that the charge under section 55 (6) (*b*) of the Transfer of Property Act for the pre-paid purchase-money comes into existence the moment the buyer pays part of the purchase-money towards the sale transaction, and that the same is available not only against the seller but also against the purchaser from the seller irrespective of the question whether the said purchaser had or had not notice of a charge, in view of the fact it is a statutory charge under section 55 (6) (*b*) independent of any question of notice The same view was taken by a Bench of the Bombay High Court in *Jibhaoo Harising* v *Ajabsingh Fakira*[5] In that case the entire

1 (1921) I L R 44 Mad 605 (F B)
2 (1947) 2 M L J 374 I L R 1948 Mad 486
3. (1958) 2 An W.R 291 A.I.R. 1960 A P. 32
4 A I R 1952 Bom 67
5. I.L.R. (1953) Bom 253.

price had been paid to the vendor in pursuance of a sale which however was found to be invalid The purchaser applied under the Bombay Agricultural Debtors' Relief Act for his claim being upheld as a mortgage with regard to the purchase price paid by him and it was held that under section 55 (6) (*b*) the purchaser was entitled to a charge over the property agreed to be sold the moment the purchase price was paid by him *vide* also Mulla *Transfer of Property Act*, 4th edition, page 319 The principle of these decisions clearly applied to the instant case This statutory charge differs from a contractual charge and is based upon principles of justice, equity and good conscience In addition there is a right of substituted security which the Hindu Law recognises in the case of a mortgage created by a coparcener of the family

From the foregoing it will be clear that from any point of view the third party will be undoubtedly entitled to a charge for the sum of Rs 9,000 at the worst either against the property agreed to be sold or some other property In my opinion that constitutes sufficient ground and interest to entitle him to be impleaded as a party.

Finally, I am unable to agree with the contention of learned Counsel for the respondent that the applicant is converting the suit for partition into a suit for specific performance, and that too without the payment of any Court-fee This contention proceeds upon a misapprehension of the real position The applicant will not get any relief by way of specific performance in this suit and this he can obtain only in a separate suit of his own He is impleaded only for the limited purpose of (*a*) establishing that the property is the separate property of his vendor, the first defendant, or alternatively (*b*) for suggesting to the Court that without prejudice to the interest of the plaintiffs the property agreed to be sold may be allotted to the share of the first defendant, so that in a separate suit of his own he can either obtain specific performance or enforce a charge under section 55 (6) (*b*) against the property in the hands of the first defendant after a final allotment in the partition suit

For all these reasons I set aside the order of the trial Court and direct that the petitioner be impleaded as a supplemental defendant.

No costs.

V K ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE M NATESAN

Soodamania Pillai (*minor*) through paternal aunt and guardian Shenbagathammal .. *Appellant**

v.

M. Diraviam Pillai .. *Respondent*

Limitation Act (I of 1908), Article 144—Applicability—Suit for possession against a stranger who gets into possession by redeeming an usufructuary mortgage—Limitation for—Nature of possession of the person redeeming the mortgage as a volunteer

Adverse possession—Usufructuary mortgage redeemed by stranger—Possession of property by such stranger—If adverse to the mortgagor

Mortgagee and sub-mortgagee—Relative rights against mortgagor

Where a property subject to an usufructuary mortgage is redeemed by a total stranger who gets into possession thereof without the consent of the mortgagor, such possession will be adverse to the mortgagor When a person having no interest to redeem a mortgage, pays off the mortgagee and secures possession, it would be a case of intrusion between the mortgagor and mortgagee without any right and such possession will be that of a stranger or volunteer The interest which entitles a person to redeem a mortgage must be an interest derived directly or indirectly from the mortgagor The interest of a sub-mortgagee is one derived from the original mortgagee and not from the mortgagor subsequent to the mortgage While a sub-mortgagee may be redeemed by his mortgagor, that is the original mortgagee, he cannot redeem the original mortgage Hence even if the stranger redeeming were a sub-mortgagee, the redemption will not be in his capacity as sub-mortgagee but under colour of a pretended title to the equity of redemption Hence a suit for possession against such

* S A. No 778 of 1962. 18th February, 1966.

a person will be governed by Article 144 of the Limitation Act 1908 It will not be a case of transfer by the mortgagee within the meaning of Article 134 nor will it be a case of redemption of the mortgage as it is already redeemed by the stranger who gets into possession on such redemption

Appeal against the Decree of the Court of the Subordinate Judge Tirunelveli in Appeal Suit No 105 of 1961 preferred against the decree of the Court of the District Munsif of Ambasamudram, in O S No 92 of 1960.

T R. Mani, for Appellant

M S Dhanakodi Pillai and *V Shanmugham*, for Respondent.

The Court delivered the following

JUDGMENT.—This Second Appeal by the defendant, who has lost in both the Courts below, raises an interesting question of law The suit purports to be one for possession on redemption of a usufructuary mortgage The property agricultural land originally belonged to one Shenbagathammal who had othied it to three brothers for a sum of Rs 450 under a registered deed dated 9th October, 1936, Exhibit A-1, being the registration copy of the deed The mortgagees had entered into possession pursuant to the othi in their favour By a registered sale deed dated 7th July, 1937. Shenbagathammal sold the property to one Muthukumaraswami Pillai for a consideration of Rs 650, a sum of Rs 450 being reserved with the vendee for discharge and redemption of the othi The plaintiff is the first wife's son of the vendee He had on the first wife's death taken a second wife by name Chellathammal Sometime after the purchase and before redemption, the vendee appears to have become mentally unbalanced and was not heard of thereafter. He is presumed to be dead Though Chellathammal had no proprietary interest in the property, on 30th July, 1941 she executed a sale deed of the property in favour of one Maharasi Ammal for a sum of Rs 600, Rs 450 of the consideration being left with the vendee Maharasi Ammal for redemption of the othi evidenced by Exhibit A-1 This Maharasi Ammal had earlier taken a registered sub-othi for a sum of Rs 150 on 22nd January, 1941 under one of the mortgagees, Exhibit A-4 being the registration copy of this sub-othi The sale in favour of Maharasi Ammal completely ignored the rights of the plaintiff and there is no dispute that Chellathammal had no title to transfer The plaintiff at the time of the sale deed was a minor aged about 12 years The rights of the plaintiff were immediately asserted by his maternal uncle on his behalf and there is evidence of a mediation pursuant to which Maharasi Ammal gave a yadast or a memorandum of agreement dated 5th April, 1943, Exhibit A-16 This document refers to the purchase by the executant Maharasi Ammal of the suit property from Chellathammal and her redemption of the same at Rs 450 It then contains a covenant that the executant will enjoy the property in lieu of interest for the sum of Rs 450 It then contains a covenant that the executant will enjoy the property in lieu of interest for the sum of Rs 450 paid for redemption and at the end of the year, if the sum of Rs 450 was paid, she would give up the property in accordance with the decision of the mediators It is recited therein that in terms of the decision, she would meanwhile be enjoying the property as under othi The property was not taken possession of pursuant to the yadast within the year as contemplated therein nor subsequently. On the death of Maharasi Ammal, the present defendant, her minor son, entered into possession and is in possession.

It is in these circumstances that the suit has been filed by the plaintiff for possession as on redemption of an othi The plaint specifically proceeds on the basis that the original othi was redeemed paying off the mortgagees. Only, the allegation is that the transaction of sale by Chellathammal and the redemption are all benami and colourable, the redemption having been out of monies belonging to the plaintiff's family Reference is made to the yadast of 1943 on the covenant therein acknowledging the liability to be redeemed on payment of the othi amount The right of redemption is stated to have accrued to the plaintiff by reason of the covenant contained in the yadast, Exhibit A-16 The plaint in the paragraph setting out the cause of action specifically refers to the redemption of the original othi on 14th August, 1941 and the covenant dated 4th April, 1943 agreeing to hand

over possession of the property on receiving the othi amount. The suit was filed on 5th February, 1960 several years after the plaintiff had become a major. The main plea for the defendant was one of limitation. It was contended that the suit in substance was one for possession, the redemption of the earlier mortgage by defendant's predecessor-in-interest being admitted. It was contended that there could be no further redemption of the original mortgage and in the absence of registration of the yadast Exhibit A-16 the plaintiff could not rely on Exhibit A-16 as creating a relationship of mortgagor and mortgagee and entitling redemption. Viewed as a mere covenant on the basis of the determination of the mediators to hand over possession on payment of Rs. 450 paid to the original mortgagees the suit as one for enforcement of the covenant will be clearly barred by limitation. As a suit against a person who had no right to be in possession, applying Article 144 also, the suit would be barred by limitation.

The lower appellate Court after referring to the sub-mortgage in favour of the defendant's mother lays emphasis on the facts that she must have come into possession under a sub-mortgage and then pursuant to the sale deed in her favour by Chellathammal, paid off the balance of the othi amount. The Court below found that the possession of Maharasi Ammal was that of a volunteer and would hold that her possession cannot be better than that of an assignee of the mortgagee. The lower appellate Court would hold that despite the allegation in the plaint that the original mortgage has been redeemed, the suit could be deemed as one for redemption of the original othi and so in time. It is observed that the plea of redemption of the original mortgage set out in the plaint is not an absolute plea. Learned Counsel for the plaintiff-respondent finds it difficult to sustain this reasoning and rightly. On some vague notions of doing equity, one cannot ignore facts specifically pleaded and made the basis of action. The whole case of the plaintiff is that the earlier mortgage was redeemed and the redemption was with the monies of the family. The right of Maharasi Ammal under the sale deed was disputed and it was alleged that the sale was a benami, sham and fraudulent transaction by the step-mother Chellathammal. One of the mortgagees has come and given evidence and speaks to the redemption of the mortgage by Maharasi Ammal.

The lower Court has relied on the decision of *Pitchaiappa* v. *Govindaraju*[1], for holding that Maharasi Ammal could be deemed to be an assignee of the mortgage. I fail to see how the decision can help the plaintiff in any manner. In that case the claim was for recovery of monies paid in discharge of a mortgage pursuant to the purchase of the property under a sale which was void and could not convey to the purchaser interest of the mortgagor. The plaintiff in that case had purchased the property from a person who was not the owner and his position in making the payment was equated to that of a volunteer under no obligation to pay thus disentitling him to claim the moneys paid. Far from the case helping the plaintiff, some of the observations therein would go against the claim of the plaintiff. Maharasi Ammal's possession on the redemption in the circumstances would be that of a total stranger. It would be adverse to the mortgager and adverse to the mortgagee. The mortgagees had parted with their possession no doubt receiving their mortgage amount and from that moment, her possession as against the mortgagees was as an absolute owner free of all encumbrance. As against the mortgagor also, her claim was openly adverse and hostile. In fact this position is clearly recognised in the yadast, Exhibit A-16, and the plaint also refers to it. The yadast refers to the purchase and redemption and contains a covenant to give up possession on payment of the money paid for redemption meanwhile retaining possession of the property as under an othi. If the covenant could be proved and established and enforced, that would be a different matter, but as creating a right in property the yadast would require registration.

By reason of the very admission in the pleadings, the plaintiff has placed himself in a predicament. If independent of Exhibit A-16, the possession of Maharasi Ammal, the predecessor-in-title could be equated to that of a mortgagee, then

1. A.I.R. 1931 Mad. 110.

there can be no difficulty, the plaintiff can redeem at any time under Article 148 of the Limitation Act I will presently examine the character of the possession of Maharasi Ammal subsequent to the redemption That the plaintiff cannot now rely upon the covenant under Exhibit A-16 is not seriously contested. Also the document cannot help the plaintiff, viewed as an acknowledgment of any subsisting right of redemption as then it has first to be established in law and on the facts that even before the date of Exhibit A-16 the possession of the defendant's mother was as a mortgagee If the possession of the mother on the date of Exhibit A-16 was in her own right and hostile, such possession cannot be converted into that of a mortgagee without a registered instrument The recitals in Exhibit A-16 could not be relied upon on the facts of this case as proof of the character of the possession; as that would be giving effect to the document, and changing the character of possession from adverse occupation to that of a mortgagee's possession The decision of the Supreme Court in *Mst Kirpal Kuar* v *Bachan Singh*[1], is clearly against any reliance on Exhibit A-16 for establishing that the possession of the defendant is that of a mortgagee Section 49 (*a*) of the Indian Registration Act precludes the admission of an unregistered document when its effect would be to affect immovable property

Learned Counsel for the plaintiff would contend that as Maharasi Ammal had no title, on her redemption of the othi she must be deemed in law to be holding the property as a mortgagee Some reference was made to her getting subrogated to the rights of the mortgagees Emphasis is further laid on the facts that even prior to the sale she was a sub-mortgagee and therefore when she redeemed the property, she would be clothed also with the rights of a mortgagee I am unable to appreciate the argument If it is a case of lawful redemption of the original mortgage then the original mortgage is no longer subsisting It has got extinguished by the redemption and there is nothing left to redeem The possession of the person redeeming would be in his own right and hostile to any other person entitled to the possession of the property on redemption unless there is any fiduciary relationship between the person redeeming and the real owner when equity may in certain circumstances intervene on behalf of the real owner If Maharasi Ammal had no interest to redeem, then her possession from the moment she secured possession paying off the mortgagees their money would be that of a stranger and a volunteer. She would have intruded between the mortgagees and the mortgagor without right If the yadast Exhibit A-16 has to be ignored in regard to the character of her possession, then it is hostile and in her own right against the mortgagor and the mortgagees, and to the knowledge of the mortgagor We are not concerned here with any claim by Maharasi Ammal to be reimbursed any money *bona fide* paid for redemption She has purported to redeem the property in the right of the mortgagor and the mortgagees had allowed themselves to be redeemed When her title was questioned on behalf of the plaintiff she agreed to surrender possession if the sum of Rs 450 she paid to the mortgagees was paid But even after the mortgagor became a major, he allowed time to run by and instituted the suit about 19 years after Maharasi Ammal's entry into possession as owner and about 13 years after he became a major.

The incidence of the sub-mortagage in favour of Maharasi Ammal prior to her purchase of the property and the subsequent redemption cannot alter the relative position I am unable to understand the contention that as sub-mortgagee she redeemed the original mortgage The interest which entitles a person to redeem a mortgage must be an interest derived directly or indirectly from the mortgagor since the making of the mortgage The interest of the sub-mortgagee is from the original mortgagee and not from the mortgagor subsequent to the mortgage Only a person who would be affected by a mortgage may redeem the mortgage The right of redemption is exercised against the mortgagee A sub-mortgagee is not affected by the original mortgage Rather his rights are in it and over it As sub-mort-

1. A.I.R. 1958 S.C. 199.

gagee, he is an assignee of the mortgagee's interest by way of security The sub-mortgagee may be redeemed by his mortgagor, that is, the original mortgagee but he cannot redeem the original mortgage He may have his usual remedies against his mortgagor, that is the original mortgagee as also against the original mortgagor. But the sub-mortgagee is not a derivative title holder of the original mortgagor to redeem the original mortgage, though the original mortgagor in his suit for redemption will have to implead the sub-mortgagee also In these circumstances, the redemption by the sub-mortgagee, Maharasi Ammal cannot be as a sub-mortgagee but under colour of title as purchaser of the property that is in her rights as owner may be pretended, of the equity of redemption There is here in this case no question of a person in any fiduciary position taking advantage of his position and securing redemption.

No doubt Article 134 of the Limitation Act may not apply to the facts of this case. This is not a case of transfer by the mortgagee for valuable consideration The transfer contemplated under Article 134 has always been understood to be a transfer of a larger interest than the transferer was competent to transfer In this case, the mortgagees did not purport to do anything outside or opposed to their mortgage They parted with possession as on redemption, and the possession of Maharasi Ammal was clearly hostile to the plaintiff, the person entitled to redeem. Such possession has continued to the knowledge of the mortgagor for over 12 years and more No plea of any fraud or collusion between the mortgagees and Maharasi Ammal has been established and it is not the plaintiff's case that Maharasi Ammal's possession was on behalf of the mortgagees Article 144 of the Limitation Act would therefore apply to the case In the circumstances, the suit has to fail. The judgments and decrees of the Courts below are therefore set aside and the Second Appeal allowed The parties will bear their respective costs throughout No leave.

R M. *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR JUSTICE T VENKATADRI.

Mohamad Hussain Rowther . *Petitioner**

v.

Kasaiyya Sholagar . *Respondent*

Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956), *section* 3 (6)—" *Maintain the land and wells in a state of proper repair* "—*Meaning of*

The word ' maintain only means to keep up or preserve and does not include reclamation of land.

Having regard to the recognised interpretation of the term ' maintain ' as distinguished from alteration, substitution or reclamation it is not open to a cultivating tenant to call upon the land-owner under section 3 (6) of the Cultivating Tenants (Payments of Fair Rent) Act to reclaim a land which has been damaged by errosion or silting up due to floods The capital expenditure referred to in the sub-section is only in respect of maintenance of the land and not reclamation

Petition under section 11 of Act XIV of 1956 praying the High Court to revise the order of the Court of the District Munsif, Rent Tribunal, Thiruvaiyaru, dated 13th September, 1962 and made in F R A No 6 of 1962 preferred against the order of the Rent Court, Thanjavur, in F R P No 262 of 1961 dated 10th May, 1962

K Subramanyam, for Petitioner.

P Raghavah, for *G Ramaswamy* and *M Kalyanasundaram,* for Respondent

The Court made the following

ORDER —This Civil Revision Petition arises out of proceedings before the Rent Court, Thanjavur The petitioner is the landowner The respondent-tenant filed an application under section 3 (6) of the Madras Cultivating Tenants (Payment of Fair Rent) Act, (XXIV of 1956), to direct the landowner to maintain the

* C.R.P. No 823 of 1963. 30th March, 1966

lands in proper condition by doing the reclamation work to the leasehold lands affected and damaged by floods of July, 1961 Both the Presiding Officer of the Rent Court, Thanjavur, and the Rent Tribunal (District Munsif), Tiruvaiyaru, have held that the landowner was bound to maintain the lands as prayed for by the tenant. It is against this order the landowner has filed the present revision petition.

Section 3 (6) of the Act is in the following words :

"The landowner shall bear all capital expenditure necessary to maintain the land and wells in a state of proper repair"

Now what is the interpretation to be given to the words 'maintain the land and wells in a state of proper repair' is the subject-matter of discussion in this petition. During the course of the trial before the Rent Court, the Presiding Officer of that Court made a personal inspection of the lands and he found that the lands were affected by the floods of July, 1961 and were covered by the alluvial soil which made the lands unfit for cultivation He also found several pits and ponds in several places and the level of the lands had been raised to a considerable extent, and that on the whole, a depth of one foot had to be lowered all round from the present level and the ponds and pits would have to be paved for making the lands fit for cultivation. He was of opinion that at least Rs 200 was required per acre for reclamation of the lands and that on the whole a sum of Rs 800 was necessary to reclaim the lands Now the question for consideration is whether the landowner could be compelled to incur this expenditure, as per the provisions of the Act

Learned Counsel on both sides copiously cited the dictionary meaning of the word 'maintain' In Funk and Wagnalls' New Standard Dictionary, page 1494 the meaning is given as 'to preserve in a particular state or condition' Shorter Oxford Dictionary, page 1190, gives the meaning as 'to preserve unimpaired' Chambers 20th century Dictionary, page 641, gives the meaning as 'to keep in existence or in any state, to preserve from deterioration' Webster's International Dictionary gives the meaning, 'to hold or keep in any particular state or condition'—Vide Ramanatha Iyer's Law Lexicon, page 766 Ramanatha Iyer says at page 767 of the Law Lexicon that the word 'maintain' does not mean to provide or construct but means to keep up, to keep from changes, to preserve. The verb, 'to maintain' signifies 'to support what is already brought into existence. 'To repair' means to restore to a sound or good state after decay, injury, dilapidation or partial destruction' The word 'maintain' therefore only means 'to keep up, to preserve.' It does not include reclamation of the lands Meaning has to be given taking the context of the statute, and the statute must be read as a whole while giving interpretation to the word The Act is entitled to give relief to tenants and certainly not to impose any onerous conditions on the landowner Jagadisan, J., has observed in *Kathayya Padayachi* v. *Ponnan Kaladi*[1], that a cultivating tenant is not a 'lessee' but has specified rights While we are considering the provisions of a statute which encroaches on the rights or imposes certain burden on the landowners and tenants, it is a recognised rule that they should be interpreted, as far as possible, with respect to their respective rights. When the Act confers exceptional privileges, they are subject to the rule of strict construction. When a tenant calls upon a landowner to reclaim the lands, we have to find out the meaning of the word 'maintain' in the context noted above.

The word 'to maintain' was the subject of discussion and interpretation in the Court of Appeal and the House of Lords. In *Regina* v. *The Inhabitanta of the Parish of Paul*[2], when the State indicted the inhabitants of a certain Parish for non-repair of highway, it was held that they were not responsible as the highway was washed by the sea and there was nothing for them to repair Similarly, in another case, *The Queen* v. *Bamber*[3], it was held that if all the materials of which a road could be made had been swept away by the act of God, the defendant could not be held liable for not repairing the road In *The Queen* v *The Inhabitants of Greenhow*[4],

1 (1963) 2 M L J 388 I L R (1964) 1 Mad 716 . 76 L W 399
2. 2 Moody & Rabinson's Reports. 307.
3 L R 5 Q B R 279
4 L R 1 Q B D 703.

there was an indictment against the inhabitants of a certain township for the non-repair of a highway Blackburn, J., held that on the facts of the case there was no proof of such destruction of the highway as to exempt the parish from their liability. The learned Judge observed that it could not be said that the road was annihilated and that it was impossible in a commercial sense, to repair it, that is, that it would cost more than the subject-matter of repair was reasonably worth. Evidently the cost of repair in that case was reasonable and not very much In *Sevenoaks Maidstone and Tunbridge Railway & Co.* v *London Chatham and Dover Railway Co* [1], a railway company was authorised to make and maintain a railway line with all proper stations, approaches and works and were empowered to transfer or sell the railway to another company to be maintained and worked While the company was in possession of the railway line, the railway company erected some stone-steps in the station yard which the company removed. In an action for mandatory injunction to compel the company to restore the steps, Jessel, M R., observed at page 634 :

> " It is very difficult to define what works of maintenance are It is a very large term, and useful or reasonable ameliorations are not excluded by it So where a railway company have to maintain a railway, I should not at all doubt that in maintaining it they might use any reasonable improvement I should say all that was within the powers of maintenance given by the Legislature , that is, you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose "

Finally, it was held that, on the true construction of the Act and working agreement, the company was entitled to exclusive possession and right of maintenance of the railways works and that the erection of the steps was a work of maintenance, and was a wrongful act on the part of the Railway Company In *Guardians of Amesbury* v *Justices of Wilts*[2], the main roads within the district of a highway authority became impassable from snow, which the highway authority removed, and they claimed one-half of the expense of doing so from the county authority under the Highways and Locomotives Amendment Act. It was held that that was an " Expense incurred in the maintenance" of such roads within section 13 of the Act and that the county authority were liable But in *Leek Improvement Commissioners* v *Justices of Stafford*[3] action was brought by the highway authority again under section 13 of the Highways and Locomotives Amendment Act, 1878 to recover a certain sum as being the half of certain expenses incurred by them in the maintenance of a portion of a road. It appeared that a part of the road in question had been macadamised, and the road requiring very frequent repairs on account of heavy traffic the highway authority thought it better instead of macadamizing the road afresh, to pave it with granite setts, and accordingly sought to recover half the costs from the county authority. Lord Esher, M. R. said at page 796 .

> " The question is whether what has been done in this case comes within the term ' maintenance '. This road was a macadamized road It might be that, if, owing to increasing traffic, it became necessary to use harder stone than had been used previously to repair such a road, so as to provide a better macadamized road to meeting the requirements of the traffic, the highway authority in so doing would only be maintaining the road But everybody knows that a macadamized road and a paved road are quite different things , and what the highway authority did in this case was not to maintain the macadamized road, but to remove it, and substitute another kind of road altogether . . . . . . ''

Finally, it was held that the county authority were not liable to pay half the expenses of the paving In *Action District Council* v. *London United Tramways*[4], by a certain arrangement, the council undertook the duty of scavenging and watering snow from the main roads On one occasion, there was a heavy fall of snow. The tramway company by means of a snow plough pushed the snow from off the portion of the road upon which their tramway lay on the sides of the road so as to form a bank of snow on either side. The plaintiff council removed the whole of the snow from the road, and also brought an action to recover from the tramway company

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1 L R. 11 Ch D 625
2. L.R. 10 Q B D. 480.
3 L.R. 20 Q B D 794
4. L.R. (1909) 1 K.B.D. 68.

the cost of removing so much of the snow as had fallen upon the portion of the road occupied by the tramway, upon the ground that the tramway company had been compellable to remove it, such removal being necessary to the maintenance of the road and the keeping of it in good condition Darling, J, observed at page 71 :

" The County Court Judge held that the language of the section pointed rather to the maintenance and repair of the materials of which the roadway was formed, and was not intended to cover a fall of snow of the kind with which he had to deal and I agree with the conclusion at which he arrived "

In *Sharpness New Docks and Gloucester Birmingham Navigation Company* v *Attorney-General*[1], an Act empowered a canal company to make a canal, and also from time to time to support, maintain and keep in sufficient repair In an action by the Attorney-General against the company for a declaration that they were liable to keep the bridges in repair so as to be sufficient to bear the traffic which might be reasonably expected to pass along the highways, having regard to the present character and needs of the district. Viscount Haldane, L C, observed at page 661

" I do not think that the words ' supported ' and ' maintained ' add anything to the effect of the expression ' kept in sufficient repair ' Now it is to be observed that what are to be kept in sufficient repair mean such bridges as were approved by the commissioners In my opinion, this language, so far as the natural meaning of the words goes, prescribes unambiguously the extent of the obligation to keep in repair It appears to me to stop short of imposing on the appellants as obligation to reconstruct so as to provide bridges of a standard higher than that which the commissioners have prescribed".

Finally, the Noble Lords held that the company were only liable to keep the bridges in repair in the condition in which they were made in accordance with the requirements of the commissioners Therefore taking a comprehensive view of the case-law on the meaning of the word ' maintain', I am of the opinion that the word ' maintain ' will never include the reclamation of the lands Even the inspection of the lands by the Officer has revealed that they required reclamartion If the demised lands are affected by floods and if capital expenditure is necessary to bring the lands to normal use, such expenses should be reasonable and not of the kind necessary for reclamation of the lands The capital expenditure referred to in the section is to maintain the lands and not reclaim the lands. In the instant case, I think that the nature of work to be done is in the nature of reclamation and not maintenance of the lands Under the circumstances, the tenant is not justified in calling upon the landowner to bear such an expenditure

The Civil Revision Petition is allowed. But there will be no order as to costs.

R.M ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

R. Narayanaswami .. *Petitioner**

v.

T K Srinivasan and another .. *Respondents.*

Madras Village Panchayats Act (XXXV of 1958), *section* 25 (2) (b) *and Provincial Insolvency Act (V of* 1920), *section* 75—*Disqualification under—Adjudication annulled under section* 43 *of the Provincial Insolvency Act—Effect of—If removes the disqualification.*

The disqualification under section 25 (2)(*b*) of the Madras Village Panchayats Act, 1958, corresponding to section 16 (2)(*b*) of the earlier Act of 1950, will apply to all persons adjudged insolvent unless he has obtained an order of discharge and certificate under section 73 (2) of the Provincial Insolvency Act or the adjudication is annulled under section 35 of the said Act The mere fact that the order of adjudication is annulled under section 43 of the Act for failure of the insolvent to apply for discharge does not remove the disqualification The provisions of section 25 (2) (*b*) of the Madras Village Panchayats Act, 1958 relating to disqualification for election as a member of a Panchayat has to be read with section 73 of the Provincial Insolvency Act which also imposes a similar disqualification

Even if section 25 (2) (*b*) of the Panchayats Act may not apply in terms, it cannot preclude the application of section 73 of the Provincial Insolvency Act relating to disqualification of an undischarged insolvent from being elected to any local authority

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1 L R. (1915) A C. 654

* C.R.P Nos. 557 and 558 of 1966 9th April, 1966.

Petitions under Article 227 of the Constitution of India, praying the High Court to revise the orders of the Court of the Election Tribunal and District Munsif of Coimbatore, dated 9th March, 1966 and made in O P Nos. 29 and 31 of 1965 respectively

S. Mohan, for Petitioner

S Sethuratnam and R Kallappan, for Respondents.

The Court made the following

ORDER.—These two Revision Petitions have been filed by one R. Narayanaswami under the following circumstances Towards the end of March, 1965, one T. K Srirangan, the contesting respondent in these petitions, was declared elected as a member of the Kondayampalayam Panchayat Board The petitioner was also one of the persons declared elected as a member The petitioner did not file any objection then that the first respondent Srirangan was disqualified for election as a member On 15th April, 1965 he filed a petition O P No 29 of 1965 to the prescribed judicial authority (District Munsif, Coimbatore) under section 28 of the Madras Panchayats Act, 1958 (XXXV of 1958) alleging that the first respondent was disqualified for election on the ground that he was an undischarged insolvent The facts on that point are really not in dispute The first respondent had filed a petition himself (Exhibit A-1) I P. No 15 of 1962 under sections 10 and 13 of the Provincial Insolvency Act (V of 1920) in the Court of the District Munsif, Coimbatore, to be adjudged insolvent He was adjudged insolvent on 12th March, 1963 and he was given six months' time to apply for discharge But he did not file an application within the time or the extended time granted to him The result was that on 20th June, 1964 his adjudication was annulled under section 43 of the Provincial Insolvency Act, the actual order being "Discharge Petition not filed Adjudication annulled" Section 25 (2) (*b*) of the Madras Panchayats Act runs .

"A person shall be disqualified for election as a member if, at the date of nomination or election, he is an applicant to be adjudicated an insolvent or an undischarged insolvent"

Along with the application O P No. 29 of 1965, the petitioner filed an application for temporary injunction to prevent the first respondent Srirangan from contesting the presidential election scheduled to take place on 19th April, 1965. An *ex parte* injunction was granted In view of that, the first respondent who appeared at the time of the election in order to contest the presidential seat was prevented from contesting that seat at the election The petitioner Narayanaswami was elected as President unopposed Thereafter, Srirangan filed O P No 31 of 1965 to set aside the election of the petitioner Narayanaswami on the ground that he had not really incurred the disqualification under section 25 (2) (*b*) of the Madras Panchayats Act, his point being that when the insolvency was annulled, it was wrong to speak of him as an insolvent and therefore wrong to describe him as an undischarged insolvent He also urged that section 172 of the Madras Panchayats Act was an absolute bar to the civil Court issuing the temporary injunction in respect of the election on 19th April, 1965 He also pointed out that under section 28 (2) of the Act, pending the decision in O P No 29 of 1965, he, Srirangan, shall be entitled to act as if he was qualified or were not disqualified.

Both the petitions O P. Nos 29 and 31 of 1965 were heard together and the learned District Munsif accepted the contention of the first respondent Srirangan both on the interpretation of section 25 (2) (*b*) of the Panchayats Act and the effect of section 172 of the Act He accordingly held that the first respondent had not incurred the disqualification under section 25 (2) (*b*) of the Act and that the injunction preventing him from taking part in the presidential election was wrong He, therefore, set aside the election of the petitioner Narayanaswami has preferred these two Revision Petitions—C R P No 557 of 1966 against the decision in O P No 29 of 1965 and C R.P No. 558 of 1966 in respect of the decision in O P. No. 31 of 1965.

Sri Mohan, learned Counsel for the petitioner, submits that in interpreting section 25 (2) (*b*) of the Panchayats Act we must have regard to section 73 of the Provincial Insolvency Act, which runs thus.

"73 (1) Where a debtor is adjudged or re-adjudged insolvent under this Act, he shall subject to the provisions of this section, be disqualified from—

(*a*) being appointed or acting as a Magistrate,

(*b*) being elected to any office of any local authority where the appointment to such office is by election or holding or exercising any such office to which no salary is attached,

(*c*) being elected or sitting or voting as a member of any local authority

(2) The disqualification which an insolvent is subject to under this section shall be removed, and shall cease if—

(*a*) the order of adjudication is annulled under section 35, or

(*b*) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part

(3) The Court may grant or refuse such certificate as it thinks fit, but any order or refusal shall be subject to appeal"

The contention of the learned Counsel is that on the terms of section 73 of the Provincial Insolvency Act, the first respondent Srirangan was disqualified from being elected as member of the Kondayampalayam Panchayat Board, because he had not obtained from the Insolvency Court any order of discharge with a certificate that the insolvency was caused by misfortune without any misconduct on his part. The learned Counsel submits that section 73 (2) of the Provincial Insolvency Act clearly shows that excepting where the order of adjudication is annulled under section 35 on the ground that the adjudication should not have been made at all or where the debts have been paid in full or where the insolvent gets an order of discharge with the certificate that the insolvency was caused by misfortune without any misconduct on his part, in all other cases, once an adjudication is made, the person will be disqualified from being elected to any office of a local authority even though the adjudication is annulled under section 43 of the Act The learned Counsel submits that if section 73 of the Provincial Insolvency Act is borne in mind in interpreting section 25 (2) (*b*) of the Madras Panchyats Act, it will be clear that when the Legislature used the words in section 25 (2) (*b*), "A person shall be disqualified for election as a member if he is an undischarged insolvent", it meant that excepting an insolvent who obtained an order of discharge, a person like the first respondent who failed to apply for discharge and in that sense was not a dicharged insolvent, would also be subject to disqualification Learned Counsel submits that this is how section 16 (2) (*b*) of the Village Panchayats Act (Madras Act X of 1950) corresponding to section 25 (2) (*b*) of Madras Act XXXV of 1958 has been interpreted by a Bench of the Kerala High Court, (Koshi, C J, and Vaidialiangam, J,) in *Koman Nambiar* v. *Narayanan Nambiar*[1] Section 16 (2) (*b*) of Madras Act (X of 1950) ran thus:

"A person shall be disqualified for election as a member, if, at the date of the nomination or election, he is an applicant to be adjudicated an insolvent or an undischarged insolvent"

In that case also the adjudication of the candidate was annulled under section 43 of the Provincial Insolvency Act It was held that he would be an undischarged insolvent within the meaning of section 16 (2) (*b*) of the Act Construing the provision in the light of section 73 of the Provincial Insolvency Act, the learned Judges observed.

"It would shock the Court's conscience to hold that a person whose adjudication has been annulled under section 43 will so far as the civic or citizenship rights are concerned be in a better position than a person whose application for adjudication is pending or whose application for discharge is pending or to whom an order for discharge, absolute or conditional, has been granted without a certificate contemplated by the latter part of section 73 (2) (*b*) To hold so would, in our opinion, be a mockery of justice Indeed that is the view which Mack, J of the Madras High Court took in *Hindu Religious and Endowments Board* v *Nallathambi Ayyaswami*[2]"

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1 I L R. 1958 Ker 215 (1957) 1 Ker L J 1183.

2 (1953) 2 M L J 518 A I R. 1954 Mad 88.

In the last mentioned case, Mack, J, applied the same reasoning in a similar situation with reference to more or less similar words occurring in section 54 (1) (*b*) of the Madras Hindu Religious Endowments Act (II of 1927) The learned Judges of the Kerala High Court pointed out that the effect of section 37 of the Provincial Insolvency Act is only to affect the rights of the creditors or the Official Receiver in respect of the property of the insolvent and cannot remove the disability attached to the erstwhile insolvent in respect of his civic or citizenship rights. The point need not be laboured because section 73 is clear on the point The argument based on section 73 of the Provincial Insolvency Act was, however, not addressed to the learned District Munsif in this case, and I am sure, if it had been addressed before him he would also have come to the same conclusion I respectfully follow the decision of Mack, J., and the Kerala High Court and hold that in this case the first respondent Srirangan had incurred the disqualification under section 25 (2) (*b*) of the Madras Panchayats Act read with section 73 of the Provincial Insolvency Act I may add that another way of looking at the matter is that even if section 25 (2) (*b*) of the Madras Panchayats Act will not in terms apply, it cannot preclude the application of section 73 of the Provincial Insolvency Act and on the terms of that section alone, the first respondent was disqualified.

The next question is the proper order to be passed now It is true that by virtue of section 172 read with section 28 (2) of the Madras Panchayats Act the issue of the injunction was wrong But it has now been found that the first respondent was disqualified to be a member, and apart from him the election of the petitioner as President has not been contested by any other person It is, therefore unnecessary to set aside the election of the petitioner as President Accordingly, both the civil revision petitions are allowed It will be declared that the first respondent Srirangan was disqualified for election as a member under section 25 (2) of the Panchayats Act read with section 73 of the Provincial Insolvency Act and that the election of the petitioner as President on 19th April, 1965 was valid. The parties will, however, bear their own costs in the two revision petitions.

R.M. — *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M NATESAN

A.P K. Narayanaswami Chettiar Firm, Pallipalayam, Salem District. .. *Petitioner**

v

V. K. Perumal Chettiar & Sons . *Respondent.*

Patents and Designs Act (II of 1911), sections 26, 29 (1), Proviso 51-A and 53—Infringement of a patent and piracy of a design—Difference between—Power of District Court to transfer a case to the High Court under section 29 (1)—Scope of

The proviso to section 29 (1) of the Indian Patents and Designs Act, 1911, which relates to transfer of a suit by the District Court to the High Court applies only to suits relating to patents under Part I of the Act Part II of the Act relates to designs and has no provision similar to section 29 (1) of the Act Hence a suit instituted under section 53 of the Act for piracy of a design cannot be transferred by the District Court *suo motu* to the High Court No doubt section 51-A of the Act provides for cancellation of the registration of a design by the High Court But even in such cases it is for the High Court to consider whether a suit on the file of the District Court in regard to piracy of a design is to be withdrawn to its own file to be tried with an application for cancellation of registration of that design under section 51-A of the Act filed in the High Court In the absence of a specific provision similar to section 29 (1) of the Act relating to Patents the District Court will have no jurisdiction to transfer a case filed under section 53 of the Act relating to piracy of a design, to the High Court

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Judge of Salem, dated 13th November, 1964 and made in I.A. No. 580 of 1964 in O S. No 15 of 1963

* C R.P. No. 230 of 1965. 13th April, 1966.

V. S Subramanyam, for Petitioner.

S R Srinivasan, for Respondent.

The Court made the following

ORDER.—This revision has been preferred against the order of the learned District Judge of Salem, directing the transfer of a suit on his file to this Court, to be tried on the Original Side, purporting to act under sections 26 and 29 of the Indian Patents and Designs Act, 1911. The suit was instituted by the plaintiff under section 53 of the Act for piracy of a design. The cause of action for the suit was imitation of the plaintiff's registered design, the plaintiff claiming that his design has been registered by the Government of India under the provisions of the Act. The written statement, in meeting this claim, has set up the available defence to such an action. It is pointed out *inter alia* that there was no question of piracy of the design and that the defendant was taking suitable action for revocation of the registration However though on the pleadings it can have no relevance, section 26 of the Act was referred to. The material issues set out herein reflect the contest between the parties clearly and unambiguously. They run thus: (1) Whether the plaintiff's registered design is not a new design and is of the pre-existing common type known as ' Kuppadam border '; (2) whether the plaintiff is entitled to a declaration of his title to the design noted in the plaint (3) whether the defendant has infringed the design of the plaintiff by fraudulent and colourable imitation amounting to piracy ; (4) whether the two designs of the plaintiff and defendant are distinct and dissimilar as contended by the defendant It is abundantly clear that the dispute between the parties relates to a design and not to a patent.

The Act under Part I deals with patents and Part II relates to designs. The issues were framed on 2nd January, 1964 and subsequently the application out of which this revision arises was filed for transfer of the suit to this Court In the affidavit, the character and nature of the suit, that is as relating only to a design and covered by Part II of the Act, is completely overlooked and the averments proceed as if the suit relates to an infringement of a patent It is then stated that the defendant was entitled to take grounds by way of defence under section 26 of the Act and the suit must be transferred to the High Court under the proviso to section 29 (1) of the Act By the proviso to section 29 (1), where there is a counter-claim for revocation of a patent by the defendant, the suit, along with the counter-claim, shall be transferred to the High Court for decision. Section 26 relates to an application for revocation of a patent. Section 29 (1) provides for the institution by a patentee of a suit in the District Court on infringement of patents. When we come to designs under Part II, section 51-A provides for cancellation or registration of a design. An application for relief has to be made to the High Court and in certain circumstances it could be made to the Controller. From the Controller an appeal is competent to the High Court. Section 53 provides for institution of a suit for piracy of registered design. There is no provision corresponding to the proviso to section 29 (1) in respect of designs Nor by any provision under the Act are the provisions relating to transfer of suits on infringement of patent made applicable to legal proceedings in respect of designs Section 54 of the Act is of limited application as it only provides that the provisions of the Act with regard to certificates of the validity of a patent and the remedy in case of groundless threats of legal proceedings by a patentee that is, sections 32 and 36 under Part I relating to patents shall apply in the case of registered designs in like manner as they apply in the case of patents with the substitution of references to the copyright in a design for references to a patent, and of reference to the proprietor of a design for references to the patentee and of references to the design for references to the invention. The proviso to section 29 (1) under Part I is not made applicable to a suit instituted under section 53 for piracy of a registered design.

No doubt section 51-A provides for proceedings in the High Court for cancellation of registration of a design But for that reason only the District Court by itself cannot direct the transfer of a suit pending before it, under section 53 of the Act.

In the absence of any provision in the Act the District Court will have no jurisdiction to transfer a suit to a superior Court The general provisions for transfer are to be found under section 24, Civil Procedure Code. The District Court cannot avail itself of this provision in this case. It may be that if a defendant applies in the High Court for cancellation of registration of a design and makes out a case he can have the suit withdrawn to the High Court for trial along with his application for cancellation of registration of a design made under section 51-A of the Act. An order of transfer in such circumstances cannot be as of course I am not now called upon to discuss the matter

It is not contended before me that the present case has anything to do with patents On a perusal of the affidavit and counter in the matter and the order made it is obvious that somehow when the application was made, the fact that the dispute related to a design and not to a patent was lost sight of The suit relating to a design, the order of transfer cannot be sustained It is represented at the Bar for the defendant that the defendant has already filed an application for cancellation of registration of the design under section 51-A of the Act. It will be open to the defendant to apply in this Court for withdrawal of the suit pending on the file of the District Court, Salem It is needless to state that the plaintiff will be free to contest the petition. But by reason of the fact that there is a possibility of the defendant getting an order of transfer, this order of transfer without jurisdiction cannot be maintained In the circumstances, the revision is allowed. It will be open to the defendant to move the District Court for stay of further proceedings pending any application for withdrawal he may make in this Court. There will be no order as to costs.

R.M. — *Revision allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M ANANTANARAYANAN, *Officiating Chief Justice*, MR. JUSTICE T. VENKATADRI AND MR JUSTICE P. RAMAKRISHNAN.

The Chief Controlling Revenue Authority, Madras .. *Applicant** (*Referring Officer*).

v.

The Madras Industrial Investment Corporation and another. .. *Respondents.*

Stamp Act (II of 1899), sections 31 and 57—Reference on a question as to the stamp duty leviable on a documents—Scope of power—High Court—If could be moved to give an opinion in hypothetical case where there is no actual document in existence

It is no doubt true that section 31 of the Indian Stamp Act empowers a party to obtain the opinion of the Collector as to proper stamp duty to be levied even without any instrument actually in existence. An opinion as to stamp duty can be sought even on a mere draft of an instrument, that might or might not come into existence in future Section 57 empowers the Chief Revenue Authority to make a reference even in respect of a document whose operational effect is doubtful

But still a reference to the High Court under section 57 of the Act must be based upon an actual case in existence pending before the Revenue Authority and not on a mere abstract or hypothetical question which may never fructify into actuality

Case referred under section 57 of the Indian Stamp Act, 1899 by the Chief Controlling Revenue Authority, Madras

The Government Pleader for the Referring Authority.

C. N. S. Chengalvaroyan for 1st Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, O.C J—The matter referred to us is under section 57 of the Indian Stamp Act, 1899 and the question for decision has been phrased as follows :

" Whether the instrument in question is liable to be stamped even if it were not to be attested and whether instruments in general are to be stamped on execution notwithstanding that other conditions

* Referred Case No. 2 of 1964. 27th April, 1966.

which validate the transfer of rights which the instrument purports to make are not present ? Whether the instrument in question is chargeable as a mortgage-deed, under Article 40 (*b*) of Schedule I of the Indian Stamp Act ? "

As we shall presently make it clear the facts establish beyond the shadow of any doubt or controversy that there is no executed document of any kind in the present case There is only a draft of a proposed document which may or may not come into existence at all The content of the reference to us is that on the assumption or supposition that this document might be executed as a deed of mortgage without attestation, the issue should be determined whether the Full Bench decision of this Court in *Crompton Engineering Co , Ltd* v. *Chief Controlling Revenue Authority, Madras*[1], which held that such a document was not a mortgage deed and was not therefore liable to be stamped as a mortgage deed, is correct or incorrect The facts, which are not in dispute, may be briefly set forth for our present purpose, as follows :

The matter has arisen on account of certain correspondence between the Madras Industrial Investment Corporation who may be termed the party initiating the reference or enquiry and the Refinance Corporation of Industry Ltd , Bombay. As will be clear from the Statement of the Case referred for opinion, the Secretary of the Madras Industrial Investment Corporation sought the opinion of the Collector of Madras under section 31, with regard to an unsigned draft of the instrument proposed to be executed It is further clear that not merely has such an instrument not been executed so far but that the explicit understanding was that it was not to be attested by any witness The point for consideration was said to be whether such an unattested document, evidencing a mortgage will be liable to stamp duty, as such, or whether, as contended by the Madras Industrial Investment Corporation, whatever its operational effect might be, it will not be liable for stamp duty as a mortgage on the authority of the Full Bench decision

On this point it is necessary to refer to two sections of the Stamp Act and to certain decisions appertaining thereto, for, it appears to us that there is much to be said for the argument that we are being asked to decide a matter which is not an actual case, but a pure hypothesis Undoubtedly, and we agree with the learned Government Pleader on that aspect, section 31 of the Act clothes a party like the Madras Industrial Investment Corporation with a power to obtain the opinion of the Collector as to the proper stamp duty to be levied even without any instrument actually executed or attested ; it is open to a party to seek such an opinion upon a mere draft of an instrument, that might never come into existence in the future Once such an opinion is sought the Collector has to exercise his powers under section 56 of the Act, and, if he feels a doubt, he makes a reference to the Chief Controlling Revenue Authority which has the power of review Under section 57, the Board of Revenue has the undoubted statutory power to make a reference of the kind that has come up before us.

Even so, we shall refer to certain decisions in support of the view that such a reference must be based upon an actual case , it cannot be a mere abstract question referred for determination upon a hypothesis which may never fructify into actuality

The relevant decisions on this aspect are to be found in *Stamp Reference by the Board of Revenue*[2] and two other decisions in which that decision has been noted. In the Full Bench decision of the Allahabad High Court, the Full Bench held that section 57 empowers the High Court to decide questions relating to instrument already in existence, and which have been made the subject of action by the Collector acting under the relevant sections of the Stamp Act. They do not empower the Court to give an opinion upon a deed, which may or may not come into existence thereafter.

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1. (1953) 1 M L J 620 I L R 1953 Mad 566 (F B).

2. I.L R 37 All. 125 (F.B.).

Another relevant decision is that of Macleod, C J, and two other Judges of the Bombay High Court in *Usuf Dadabhai* v. *Ghand Mahomed*[1] This also emphasises the principle that the Chief Revenue Authority cannot refer an abstract question, when there is no pending case before it Under section 57 it can only refer a pending or actual case which requires to be disposed of by the authority on receipt of the High Court's judgment In other words, it is not permissible to the Chief Revenue Authority, under the guise of its powers under section 57, to obtain the determination by this Court a hypothetical question, relating to documents which might never come into existence, even though such documents might have been contemplated by the concerned party

In re *Marine Insurance Policies*[2] the same situation was considered with reference to previous cases cited by us. Rankin, C J., pointed out that the Revenue Authority could not obtain the opinion of the High Court on a question of an abstract or general character, not arising out of a particular case and actual instrument. It appears to us that these three decisions do furnish two guiding principles or criteria which could be applied to any given case. The first is that a purely abstract proposition of law or a hypothesis in law, however, likely it may be that a case corresponding to that hypothesis may later arise in practice, cannot be referred to this Court, for resolution of a conflict of cases or for decisions under section 57. The second is that it is essential that there should be in existence an actual case, which has to be decided in the light of the opinion furnished by the Court with regard to an actual document, and not merely to some contemplated document.

The learned Government Pleader stresses that these cases do not exclude the main line of his argument that section 31 itself empowers a party to obtain the opinion of the Collector, even on a mere draft or a contemplated document. When the Legislature has so provided, and the Collector can, when he feels a doubt, make a reference to the Board of Revenue under section 56, it would follow, according to the learned Government Pleader, that the Board of Revenue can refer to this Court even an instance where there is no actual document, but only a draft which may never eventuate into a document, in other words, even a hypothesis can be the subject of reference, provided that it arose out of an approach to the Collector under section 31.

We do not think that it is necessary to finally decide this point, but we do feel that it is essential that there should be a 'case,' within the meaning of that expression in the decisions cited by us Commonsense would dictate the conclusion that a 'case' of that kind cannot merely refer to a solicitation of the opinion of the Collector by a party, it naturally presupposes an actual document of some kind, whether attested or unattested, and an actual problem of the stamp duty to be levied on an existing document On this ground alone, we feel that the reference to us will not bear any further resolution by proceeding into the question whether the Full Bench decision in *Crompton Engineering Co, Ltd* v *Chief Controlling Revenue Authority, Madras*[3], was correctly decided or otherwise.

Even apart from this, upon the broad doctrine of *stare decisis* we do not see why we should proceed to dispose of the matter, as we have been invited to do by the Government Pleader, by making a reference to a Fuller Bench, concerning the validity of the decision in *Crompton Engineering Co, Ltd* v *Chief Controlling Revenue Authority, Madras*[3], No doubt, the doctrine of *stare decisis* is generally been expressed in a different form, *viz*, that where a particular principle of law has been formulated and applied in a particular manner, in a series of decisions over a period of years, even a Court doubting the correctness of the view held for many years, in the light of which many rights might have been decided will not lightly have the propriety of such a view re-examined. As stated in Roscoe Pound's 'Jurisprudence', Volume III, page 562, the doctrine has been expressed as:

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1 A I R 1926 Bom 51
2. A I R 1929 Cal. 799.
3 (1953) 1 M L J 620 I L R 1953 Mad. 566 (F B)

" a feature of the common law technique of decision That technique is one of finding the grounds of decision in reported judicial experience, making for stability by requiring adherence to decisions of the same question in the past, and allowing growth and change by freedom of choice . . when new questions arise or old ones take on new forms "

These dicta do imply that there must be an actual question before Court, before the principle of *stare decisis* is lightly set aside. In the present case, we desire to record that we are not proceeding into the merits of the contention urged by the learned Government Pleader why, in his view, the decision of the Full Bench, in *Crompton Engineering Co , Ltd* v *Chief Controlling Revenue Authority, Madras*[1], requires reconsideration, at the hands of a Fuller Bench We think it is sufficient to state the facts, and to lay it down that, in the absence of an actual case or a document actually in existence, and, in the mere context of a hypothetical case and a document which may never eventuate, we do not think that the principle of *stare decisis* should be departed from, or that we should be at all justified in making any reference to the Fuller Bench for reconsideration Consquently, we answer the reference by stating, that *Crompton Engineering Co. Ltd* v *Chief Controlling Revenue Authority, Madras*[1]. holds the field, as far as the present circumstances of reference are concerned, and that, such an instrument is not chargeable as a mortgage as laid down in the decision.

No order as to costs.

R.M. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. M ANANTANARAYANAN, *Officiating Chief Justice*

The Hilal Press: Registered Firm No 276 of 1957, through its Partner Ahmed Yusuf *Petitioner**

v.

Sri Sivagami Sundaram Sri Chidambara Swami Devasthanam, Sattur, through the Executive Officer *Respondent.*

Limitation Act (IX of 1908), section 5—Excusing delay under—Principle of—Finding of gross negligence—If delay could still be excused—Institutions and corporate bodies if should be shown any greater indulgence than an ordinary suitor.

When there is a clear finding of fact that there has been gross negligence on the part of a suitor it would be erroneous to apply section 5 of the Limitation Act to condone any delay on his part It may be that the question of excusing the delay in particular cases is in the discretion of the Court concerned But if the Court finds that there has been gross delay which could not be explained, it cannot exercise its discretion to condone the delay in spite of the negligence That the suitor is an institution or corporate body or Government does not make any difference in principle and the law of limitation will operate equally against an individual or corporate body

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Judge, Tirunelveli, dated 9th July, 1964 and made in I A No. 73 of 1964 in unregistered Appeal G No 447 of 1964 (O S. No 626/62 District Munsif's Court, Tirunelveli)

V. Ratnam, for Petitioner.

R. Sundaralingam and *K Jayaraman* for Respondent.

The Court delivered the following

JUDGMENT —The question involved in this revision proceeding relates to the proper application of section 5 of the Limitation Act to certain facts. I may immediately state that the respondent, Sri Sivagami Sundari Sri Chidambara Swami Devasthanam, Sattur, which succeeded in obtaining the admission of an appeal filed well beyond time, has sought to advance the contention that the question of excusing the delay in such a matter, and the question whether sufficient cause existed for excusing the deley, were essentially within the discretion of the Court concerned. This is on the authority of *M Ramalingam* v. *Koteswara Rao*[2]. But

1 (1953) 1 M L J 620 I L R 1953 Mad. 566 (F B) 2 (1949) 1 M L J. 144.

* C.R P. No 1860 of 1964. 24th June, 1966.

unfortunately for the respondent, it is the Court below (Court of the learned District Judge, Tirunelveli) which explicitly finds, not merely that there was considerable delay in filing the appeal, about 75 days on the admission of the respondent institution itself, but also that there was negligence.

I may quote the very words of the learned District Judge embodying his conclusions

" A perusal of the evidence and also the affidavit filed in support of this petition shows that there was negligence on the part of the Executive Officer in not only obtaining copies of the judgment and decree but also in obtaining sanction from the Commissioner Whatever that be gross negligence by individuals should not be taken into serious consideration in a case of this kind, where the appellant is an institution "

The learned Judge then proceeded to condone the delay under section 5 on payment of certain costs.

It appears to me to be clear, therefore, that the finding of fact of the learned Judge is that there was gross negligence on the part of the respondent-institution, though no doubt the negligence was actually due to the Executive Officer of the institution, in regard to the matter of the appeal When there is this finding, it would certainly be erroneous application of section 5 to condone the delay, and that is indisputable As a question of law, I am afraid that the learned Judge has misdirected himself in thinking that the fact that the party is an institution or a corporate body, and not an individual, makes any essential difference.

Sri Ratnam for the revision petitioner draws my attention to two authorities. In one of them, *District Board, Sargodha* v *Shamas Din*[1], Tekchand, J, observed that he could not accept the argument that a corporate body was entitled to greater indulgence in such a matter, than a private individual :

" If a District Board chooses to embark on litigation, its officials and advisers must act with at least as much diligence as is expected from an ordinary litigant "

In *Union of India* v *Kanwar*[2], a Division Bench of that Court held (at page 369) that the law of limitation operated equally for or against a private individual as also the Government, and that " no special indulgence can be shown to the Government which, in similar circumstances is not to be shown to an individual suitor". The learned Judges have proceeded to observe that delays in the Government offices were no justification for invoking the power of the Court under section 5.

In the light of these principles, I am constrained to allow the Civil Revision-Petition, and set aside the order in the interlocutory application admitting the unregistered appeal , It follows that the decree against the Devasthanam becomes final.

But I may add that since the revision petitioner, who is a private party, has a decree both against the Devasthanam and the Executive Officer who was primarily responsible for the claim which was the basis of the suit, it is only equitable that the revision petitioner should first proceed by way of execution of the decree against the individual ; it is only if this fails, that the Devasthanam will be liable as co-judgment-debtor The parties will bear their own costs

R.M. *Petition allowed.*

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1. 123 I.C 83.
2. A.I.R. 1958 Punj. 365.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. VENKATADRI.

S. Thirupathi Pillai . *Appellant**

v.

Ganthimathi Ammal and another .. *Respondents.*

Practice—Suit for declaration of title under a settlement deed against a subsequent alienee—Subsequent sale deed—If should be set aside before granting the relief

Madras Court-fees and Suits Valuation Act (XIV of 1956), section 25—Suit for declaration of title under a settlement deed—Subsequent sale deed—When should be set aside

It may be that in certain circumstances a plaintiff, who seeks the relief of declaration of her title to the suit property on the basis of a settlement deed in her favour and challenges the validity of a subsequent sale of the same property by the settlor, may have to set aside the sale deed before she seeks the relief of declaration of her own title But normally when once a settlement deed is executed, the settlor has no right to revoke the same except under certain conditions Hence the settlor will have no legal capacity to execute subsequently a sale deed of the same property as he has no title to the same. In such circumstances the person claiming title under the earlier settlement deed need not set aside the sale deed She can ignore the sale deed and get a declaration of her title under the settlement deed.

Appeal against the Decree of the Court of the Subordinate Judge, Sivaganga, in Appeal Suit No 101 of 1961, preferred against the decree of the Court of the District Munsif of Sivaganga in Original Suit No 280 of 1960

K C Rajappa, for Appellant

A. Sundaram Ayyar and *P. Balasubramaniam*, for Respondents

The Court delivered the following

JUDGMENT —This appeal arises out of a suit instituted by the first respondent for declaration, possession and damages The short facts of the case are these.

The suit property originally belonged to one Sivarama Pillai, the father-in-law of the first respondent Ganthimathi Ammal He settled the suit property on Ganthimathi Ammal under a registered settlement deed dated 14th November, 1947. The contents of the deed reveal that the suit property was settled on the first respondent in consideration of her marrying his son as his second wife But, in the year 1956, Sivarama Pillai revoked the settlement deed, and by Exhibit B-2 dated 24th March, 1959 he sold the suit property to his own son-in-law the appellant herein. The first respondent therefore filed the suit for declaration and possession.

The appellant resisted the suit contending that the settlement in favour of the first respondent was a nominal document not acted upon and that in any event after the revocation of the settlement deed, he executed, a sale deed in his favour which was binding on the first respondent. On these pleadings, the parties went to trial.

The Courts below gave a concurrent finding that the settlement deed, Exhibit A-1, was a true and valid document binding on the appellant, and that the sale deed Exhibit B-2 was not binding on the first respondent.

In this Second Appeal by the son-in-law of Sivarama Pillai, learned Counsel for the appellant, without disputing the finding of fact, raised a point of law that, when a person comes to Court for declaration of her title and possession on the foot of a settlement deed and also pleads that a sale deed has been executed in favour of another of the very same property, then her suit would not be maintainable without setting aside the subsequent sale deed To support the proposition of law, learned Counsel cited the decisions in *Raja of Ramnad* v *Arunachalam Chettiar*[1] and *Muppudathi Pillai* v *Krishnaswami Pillai*[2]. There may be some force in his contention. But I am of the view that the principle of those decisions would not be applicable to the facts of the present case Once a settlement deed is executed, then the settlor has no right to revoke the settlement deed except under certain conditions He has no legal capacity to execute the sale deed, because he has no title to the property.

* S A No 1519 of 1962 27th June, 1966.

1. 24 M.L.J. 592. 2. (1959) 2 M.L.J. 225 (F.B).

Therefore there is no necessity for the first respondent asking for cancellation of the sale deed She can ignore the sale deed and get a declaration on the foot of the settlement deed Under those circumstances, I do not see any reason to interfere with the decision arrived at by the Courts below

The Second Appeal is dismissed In the circumstances, each party will bear his or her costs throughout No leave

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K S. VENKATARAMAN.

Sakuntala .. *Petitioner**

v.

Thirumalayya .. *Respondent*

Criminal Procedure Code (V of 1898), sections 12 and 488 (8)—Institution of proceedings under section 488 —Forum of

Section 488 (8) of the Criminal Procedure Code, provides that a proceeding against a husband under that section can be instituted against any person in any District where he is or resides or where he last resided with his wife But this provision has to be read with section 12 of the Code relating to local jurisdiction of Courts The sub-section does not authorise the institution of proceedings anywhere in the District concerned. The particular Magistrate before whom the proceedings have to be filed should be one having jurisdiction over the local area where the respondent resides or last resided with his wife.

It is no doubt true that an order by a Magistrate not having jurisdiction over a local area is not void under section 530 (*n*) and is only a curable irregularity under section 531 of the Code But such considerations cannot apply where the objection as to jurisdiction is taken at the outset

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sub-Divisional Magistrate of Poonamallee, dated the 28th day of June, 1966 and made in unnumbered M C S R. No. 672 by directing the Sub-Divisional Magistrate to take it into file and dispose the matter.

S. Balasubramaniam, for Petitioner.

The Court made the following

ORDER :—This revision petition under section 439, Criminal Procedure Code, arises out of a proceeding instituted under section 488, Criminal Procedure Code, by a wife against her husband for maintenance on the ground of cruelty and second marriage. The learned Sub-Divisional Magistrate, Poonamallee, before whom the proceeding was instituted, declined to entertain the petition on the following ground :

"The place where the respondent resides, or is or where he last resided with the petitioner it Tiruttani. So, the case would be filed before the District Munsif-cum-First Class Magistrate as Tiruttani."

Now it is not disputed before me by Sri S. Balasubramaniam, the learned Counsel for the petitioner, that the respondent (husband) has always been residing in a village in Tiruttani Taluk But he contends that section 488 (8), Criminal Procedure Code, enables the petitioner to institute proceedings anywhere in the District of Chingleput of which Tiruttani Taluk is a part and that it is more convenient for the petitioner to institute the proceeding at Poonamallee than at Tiruttani as she is residing at Tambaram and Poonamallee is nearer to Tambaram and Tiruttani is far away

Section 488 (8) runs thus :

"Proceeding under this section may be taken against any person in any District where he resides or is, or where he last resided with his wife, or as the case may be, the mother of the illegitimate child."

But this has to be read along with section 12 of the Code which says that the State Government may appoint as many persons as it thinks fit, besides the District

* Crl R C No 857 of 1966.
(Crl R P. No. 841 of 1966) 12th July, 1966.

Magistrate, to be Magistrates of the First, Second or Third Class in any District outside the Presidency towns, and the State Government or the District Magistrate subject to the control of the State Government may, from time to time, define local areas within which such persons may exercise all or any of the powers with which the ymay respectively be invested under this Code Section 488 (1) says that the proceeding may be instituted before the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class

Now section 488 (8) is intended to apply to a case where the husband is residing in a particular District, say, Chingleput, at the time of the presentation of the petition, but was residing last with his wife in another District, say, South Arcot District. In such a case, according to the provision, the proceeding can be instituted either in Chingleput District or in South Arcot District. But the provision does not say that the proceeding may be instituted in any Court in the District. Having indicated the District where the proceeding may be instituted we are thrown back on section 12 for the determination of the particular Magistrate before whom the proceeding should be instituted The Magistrate will be one having jurisdiction over the local area where the respondent resides or last resided with his wife Such a construction alone would give effect both to section 488 (8) and section 12 of the Code On the other hand, the construction sought to be placed by the learned Counsel for the petitioner would omit section 12 altogether and would further import words, in section 488 (8) which are not there. In other words, the construction proceeds as though sub-section (8) has said " may be taken against any person anywhere in any District where he resides " It follows that the learned Magistrate is right in his order The learned Counsel for the petitioner says that where a Magistrate not having jurisdiction over a local area passes an order, it is a curable irregularity under section 531 and that order will not be void under section 530 (*n*), and he refers to Ramanatha Iyer's Commentary on the Code of Criminal Procedure under section 488—section 2—Note 5 (page 2135) and the cases quoted therein, and note 16 in Sohoni's Criminal Procedure Code (page 2660) But that would not apply to a case where the objection is raised even at the outset.

The petition is accordingly dismissed

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K S. VENKATARAMAN.

R. Chockalingam .. *Petitioner**

v.

Sundari .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488 (6)—Power of Court to exempt personal attendance of the husband in a maintenance case—Scope of

Section 488 (6) of the Criminal Procedure Code, analogous to section 353 of the Code, empowers a Court in a maintenance case to grant a general exemption to the husband from personal appearance and permit him to be represented by his pleader The words 'when his personal attendance is dispensed with' are wide enough to confer ample powers on the Magistrate to give a general exemption from personal appearance and is not restricted to any particular hearing date But it is always open to the Magistrate to insist on the personal attendance whenever necessary, such as for purposes of identification

The sub-section gives ample powers to the Court to pass an order generally exempting the husband from personal attendance in Court and permitting evidence to be taken in the presence of his Pleader especially when the proceedings under section 488 are quasi-civil in nature.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate (J) of Ramanathapuram at Devakottai in M P. No 863 of 1965 in M C No 334 of 1965 dated 2nd March, 1966.

* Crl R C No 423 of 1966
Crl R P No 418 of 1966

15th July, 1966.

A. K Sreeraman, for Petitioner

N. Chandrasekharan, for the Public Prosecutor, for State.

G N Chary and *R Vatsalakumari*, for Respondent.

The Court made the following

ORDER —This revision petition filed under section 439, Criminal Procedure Code, arises out of proceedings in M C No 334 of 1965 instituted under section 488, Criminal Procedure Code, before the learned District Magistrate of Ramanathapuram by one Sundari against one Chockalingam Sundari has alleged in her petition that Chockalingam married her, and she claims maintenance for herself and her child Chockalingam appeared before the Court and filed an application M P. No 863 of 1965 stating that, for the reasons mentioned in his petition, the Court might be pleased to dispense with his personal attendance and to permit him to appear by a Pleader. He submitted that the action was in the nature of a blackmail but we are not now concerned with it He pointed out that he was District Superintendent of Police, Kottayam District in Kerala State, and that, because of his official duties, it would not be possible for him to attend the Court of the District Magistrate at Devakottai for all the hearings. Sundari filed a memorandum of objection stating that the presence of Chockalingam was necessary since her witnesses had to identify him The learned District Magistrate has dismissed the petition, and hence this revision petition by Chockalingam

In the course of his order, the learned District Magistrate refers to section 488 (6), Criminal Procedure Code, which runs thus

" All evidence under this chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his Pleader, and shall be recorded in the manner prescribed in the case of summons cases .

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Any orders so made may be set aside for good cause shown on application made within three months from the date thereof "

The learned District Magistrate recognises that section 488 (6), Criminal Procedure Code, empowers him to dispense with the presence of the husband but proceeds to observe that no provision of law has been enacted in the Code ' as to in what cases the personal attendance of the husband in a maintenance proceeding could be dispensed with,' and that, consequently, the husband must be present in Court, when evidence is recorded He then says that if for any particular hearing the husband finds it not possible to attend the Court, he may get specific permission of the Court for absence for that particular hearing, in other words, that it was not possible for the Magistrate to exempt him from appearance generally.

I am unable to agree with the learned District Magistrate, when he thinks that section 488 (6), Criminal Procedure Code, does not empower him to grant general exemption to the husband to be represented by his Pleader at the hearings. Section 488 (6) does not contain any such limitation. The words ' when his personal attendance is dispensed with ' ' are wide enough to confer ample powers on the Magistrate to give general exemption to the husband Of course, it is always open to the Magistrate to insist on the presence of the husband at any particular hearing or hearings for purposes of identification or otherwise

This portion of section 488 (6), Criminal Procedure Code, is similar to section 353, Criminal Procedure Code, which says :

" Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his Pleader "

In *Ummal Hasanath*, In re[1], Rajamannar, J., (as he then was) held that, in view of the language of section 353, Criminal Procedure Code, it was open to

1. (1947) 2 M L J 142 I L R 1948 Mad 498.

the Magistrate to pass an order generally exempting the accused from appearing in the case. In that case, the accused was a purdahnashin lady, and the charge against her was for murder under section 302, Indian Penal Code She was arrested without a warrant and so section 205, Criminal Procedure Code, could not be invoked. The learned Judge held that that did not prevent the accused invoking the powers of the Court during the actual enquiry or trial under section 353, Criminal Procedure Code The learned Judge also held that, in any event, the High Court had power under section 561-A, Criminal Procedure Code, and, having regard to the circumstances of the case, he directed that the personal attendance of the accused might be dispensed with, but adding that the Magistrate had always the power to direct her personal attendance It seems to me that the above decision will apply equally to section 488 (6), and that section 488 (6) gives ample powers to the Magistrate to pass an order generally exempting the husband and permitting evidence to be taken in the presence of his Pleader. In fact, if the presence of the accused could be generally dispensed with in a criminal case under section 353, Criminal Procedure Code, there is greater reason why the presence of the husband under section 488 (6) may be dispensed with because after all it is a quasi-civil proceeding.

Sri G N Chary, the learned Counsel appearing for the respondent in this petition (Sundari), urges that the proviso to section 488 (6), Criminal Procedure Code, distinguishes section 488 (6) from the provisions of section 353, Criminal Procedure Code, and also sections 205 and 540-A, Criminal Procedure Code. According to him, distinction lies on the fact that in the absence of the husband, the proviso to section 488 (6) merely permits the Court to proceed in his absence but does not empower the Magistrate to issue a warrant of arrest whereas in the case of other, accused who is absent, a warrant could issue I am, however, unable to accept this submission. The proviso, in my opinion, has no relevancy on the question at issue It merely says that, where the husband is not present and his Pleader is not present, and there is reason to believe that the husband is wilfully avoiding service or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case in his absence What we have to deal with is a case where the husband himself has applied for permission to be represented by a Pleader, and the proviso cannot apply to this case

Taking into account all the circumstances of the case, I set aside the order of the learned District Magistrate and grant an order exempting Chockalingam from appearance But it is open to the Magistrate to insist on his personal attendance whenever necessary.

R M ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR P CHANDRA REDDY, *Chief Justice* AND MR. JUSTICE P. S. KAILASAM.

State of Madras represented by the Commissioner of Commercial Taxes, Madras .. *Appellant**

v

V Guruviah Naidu and another .. *Respondents.*

Madras General Sales Tax Act (IX of 1939), section 12 (3) (i)—Exercise of revisional power by Board of Revenue under—Limitation period of 4 years prescribed—Starting point—Merger of original order in the appellate order—Theory of—Relevancy and limitations.

For the assessment year 1954-55, the Deputy Commercial Tax Officer by his order dated 29th February, 1956 assessed the respondent, an unlicensed dealer in hides and skins, to tax on the assumption that unlicensed dealers in hides and skins were not liable to tax under section 6-A of the Madras Act IX of 1939. Not satisfied with this order, the respondent claiming further deductions appealed to the Commercial Tax Officer who allowed a further deduction by his order dated 7th August, 1957 On 12th August, 1960, the Supreme Court delivered judgment in a case holding that unlicensed dealers in hides and skins were liable to tax under section 6-A Thereupon the Board of Revenue on the strength of this decision issued a notice on 23rd June, 1961, to the respondent to show cause why his turnover for 1954-55 should not be refixed in accordance with the decision of the Supreme Court.

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*W A No 286 of 1963 25th March, 1965.

On the question whether the notice was issued within time allowed by law, it was contended on behalf of the State that under section 12 (3) (i) of the Madras Act (IX of 1939) the Board of Revenue may exercise its power of revision within four years from the date on which the order sought to be revised was communicated to the assessee, that the order referred to in the sub-section was the order of the Commercial Tax Officer dated 7th August, 1957, in which, it was contended, the order of the Deputy Commercial Tax Officer dated 29th February 1956 merged in law and that therefore the notice issued by the Board of Revenue was within time On the other hand the respondent contended that the order referred to in section 12 (3) (i) was the order of the original authority, dated 29th February, 1956, and that as the notice was more than four years from that date, it was barred by time

Held, the order of the Board of Revenue seeking to refix the turnover of the respondent by its notice dated 23rd June, 1961, was barred by time

It is no doubt true that an order appealed against merges in the appellate order and that thereafter it is the appellate decision alone which subsists and is capable of enforcement But this is qualified by the proposition that what merges in the appellate order under appeal is what was and could be the subject-matter of the appeal before the appellate authority and not any matter which was outside the scope of the appeal before the appellate authority

Commissioner of Income-tax, Bombay v *M/s Amritlal Bhogilal & Co*, (1959) S C R. 713, relied on.

In the instant case the appeal that was preferred against the order of the Deputy Commercial Tax Officer was by the respondent against the assessment made against him It was admitted that the Sales tax Department had no right of appeal and the question of the liability of the respondent to tax as an unlicensed dealer in hides and skins was not the subject-matter of appeal before the appellate authority This being the position, the theory of merger could not apply so far as the subject-matter, *viz*, the liability of the respondent as an unlicensed dealer in hides and skins, was not before the appellate authority. Hence the Board of Revenue in the present case could have exercised its power of revision only within four years from the date of the order of the Deputy Commercial Tax Officer

Appeal under Clause 15 of the Letters Patent against the Order of Veeraswami, J, dated 18th April, 1963, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No 764 of 1961 presented under Article 226 of the Constitution of India to issue a writ of prohibition, prohibiting the respondent therein from proceeding with his proposed revision contemplated in his B/4846/61-1, dated 23rd June, 1961

Additional Government Pleader (*V. Ramaswami*), for Appellant.

Sivaswami for *Sundararajan* and *Sivaswami*, for Respondent.

The Judgment of the Court was delivered by

Kailasam, J—This appeal is preferred against the decision of Veeraswami, J., allowing a writ petition preferred by the respondent and issuing a writ of prohibition against the appellant prohibiting them from proceeding with their proposed revision of sales tax contemplated in their Order B. 4846/61-1, dated 23d June, 1961.

The respondent is an unlicensed dealer in hides and skins For the assessment year 1954-55 he submitted a return for a gross turnover of Rs. 46,14,995-5-1. Out of this amount he claimed a sum of Rs 45,48,305-2-10 as not liable to tax. The Deputy Commercial Tax Officer by his order, dated 29th February, 1956, assessed the respondent to a taxable amount of Rs 66,691-2-3, basing his conclusions on the decision in *Noor Mohamed & Co.* v *State of Madras*[1], that unlicensed dealers in hides and skins were not liable to tax under section 6-A of the Madras General Sales Tax Act, 1939 Not satisfied with this order, the respondent preferred an appeal to the Commercial Tax Officer claiming a deduction of the entire amount. The Commercial Tax Officer allowed a further deduction of Rs 52,220-1-9, and assessed the taxable turnover at Rs 14,471-0-6 by his order, dated 7th August, 1957 On 12th August, 1960, the Supreme Court in *State of Madras* v *M A Noor Mohamed & Co*[2], reversed the decision in *Noor Mohamed & Co* v *State of Madras*[1], and held that unlicensed dealers in hides and skins were liable to tax under section 6-A of the Act The Board of Revenue, on the strength of the decision of the Supreme Court in *State of Madras* v *M A Noor Mahamed & Co*[2], gave a notice under section 34 of Madras Act I of 1959 on 23rd June, 1961, to show cause why the turnover for 1954-55 should not be fixed at Rs 45,52,329-6-1 in accordance

1. (1956) 2 M L J. 374 : 7 S T C 792
2. (1961) 1 M.L J. (S C) 51 : (1961) 1 S C. R 148 (1961) 1 An W R (S C) 51 : (1961) 1 S C J 301

with the decision of the Supreme Court. A writ petition was preferred by the respondent for prohibiting the State of Madras from proceeding with the proposed revision of the assessment The writ petition having been allowed, the State of Madras have preferred the present writ appeal

The only question that arises in this writ appeal is whether the order of the Board of Revenue, seeking to refix the turnover by its notice, dated 23rd June, 1961, is within time According to the State, under clause (1) of sub-section (3) of section 12 of the Madras General Sales Tax Act (IX of 1939), the Board of Revenue may exercise its power of revision within a period of four years from the date on which the order was communicated to the assessee, as provided under section 12 (4) (*b*) of the Act The order referred to in the sub-section, it is submitted, is the order, dated 7th August, 1957, passed by the Commercial Tax Officer in which, it is contended, the order of the Deputy Commercial Tax Officer, dated 29th February, 1956, became merged in law, whereas, on the side of the assessee, it is contended that the order referred to in the sub-section is the order of the Deputy Commercial Tax Officer, dated 29th February, 1956 and as the notice is more than four years from that date, the order is barred by time

Though the notice is given under section 34 of the Madras General Sales Tax Act, 1959, by virtue of the saving clause in section 61 of the Act, it is conceded that the provisions of the old Act are only applicable Therefore, the provisions of the Madras General Sales Tax Act (IX of 1939), may be examined.

Under section 9, on the submission of a return by the assessee, the assessing authority is empowered to assess the tax on the dealer An appeal may be preferred against the order of assessment made under section 9 to the appellate authority within thirty days from the date of receipt of the order of assessment. On hearing the appeal, the appellate authority may pass such order as it thinks fit and the order is final subject to the provisions of sections 12 to 12-C of the Act. From the decision of the appellate authority the assessee is given a right of appeal to the Appellate Tribunal within sixty days from the date of the receipt of the order. The appellate authority is empowered to pass such order as it thinks fit after giving the parties a reasonable opportunity of being heard. From the decision of the appellate authority a right of revision is conferred on the assessee as well as the Deputy Commissioner within sixty days from the date of the communication of the order.

Along with the right of appeal conferred on the assessee, a right of revision is also provided. Under section 12 the Commercial Tax Officer, the Deputy Commissioner and the Board of Revenue are conferred powers of revision The powers are exercisable *suo motu* or on application by the assessee. The right of an assessee to apply for a revision under section 12 is limited, for the right of revision is available only in cases where there is no appeal or where he has not preferred an appeal The Commercial Tax Officer, in exercise of his revisional jurisdiction, is empowered to examine the records of any officer subordinate to him for satisfying himself as to the legality or propriety of such order and the regularity of the proceeding and to pass such order as he may think fit So also the Deputy Commissioner is entitled to examine the legality or propriety of the order and the regularity of the proceeding before the Commercial Tax Officer and pass such order as he may think fit The Board of Revenue is empowered to examine the legality or propriety of the order or the regularity of the proceeding before the Deputy Commissioner, and to pass such order as it thinks fit. Under sub-section (4) of section 12 the power of revision by the Commercial Tax Officer is exercisable within three years from the date on which the order was communicated to the assessee, and the power of the Deputy Commissioner and the Board of Revenue is exercisable within a period of four years from the date on which the order was communicated to the assessee It may be mentioned that under sub-section (7) of section 12 the revising authority shall not pass any order enhancing any assessment unless an opportunity has been given to the assessee to show cause against the proposed enhancement. It will be thus seen that the revising authority exercising the powers

suo motu, can give notice to the assessee and enhance the assessment, while exercising powers in dealing with an application by the assessee, can exercise it after giving him an opportunity to show cause against the proposed enhancement.

A right of appeal is given under section 12-A to the assessee from the order of the Deputy Commissioner passed in the exercise of his revisional powers under section 12 (2), and an appeal is also provided to the assessee from an order of the Board of Revenue passed under section 12 (3) to the High Court, within sixty days from the date of communication of the order.

The Act provides the assessee a right of appeal to the appellate authority, the Appellate Tribunal, and in certain cases to the High Court. The officers are empowered under section 12 to exercise powers of revision *suo motu* or on application by the assessee. An appeal also is provided against the orders passed in revision In the case of powers of revision, the period of limitation is also clearly specified in the Act When specific provisions regarding limitation are found in the Act, it may not be justifiable to travel outside the Act The contention on behalf of the State is that when once the appellate authority, as in this case the Commercial Tax Officer, has fixed the taxable turnover, the order of the authority against which the appeal is preferred is no longer in force and has become merged in the appellate order It was contended by the learned Additional Government Pleader that after an appeal had been decided, the original order is no longer available as it had become merged in the appellate order and, therefore, the only order that could be revised is the appellate order. It was therefore submitted that the period of limitation of four years prescribed under section 12 (4) (*b*) can only be from the date of the appellate order In support of his contention that the order appealed against became merged in the appellate order, the learned Additional Government Pleader relied on several decisions which may be referred to In *Kristnama Chariar* v *Mangammal*[1], it was held that under Article 179 of Schedule II to the Limitation Act, when a portion of a decree had been appealed against and a portion had not been appealed against the period of limitation for an application to execute the portion not appealed against runs from the date of the decree in appeal Bhashyam Ayyangar, J , observed that

"When an appeal is preferred from a decree of a Court of first instance, the suit is continued in the Court of Appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the Court of Appeal or only a part of it The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance. The mere fact that a matter is litigated both in the Court of first instance and again, though only in part, in the Court of Appeal cannot convert or split the suit into two and there can be only one final decree in that suit viz., the decree of the Court of Appeal "

In *Nagendranath De* v. *Sureshchandra De*[2], the Privy Council, construing Article 182 (2) of the Limitation Act, which provides that where there has been an appeal, the time begins to run from the date of the final decree or order of the appellate Court, held that the period commenced only from the date when the appeal was disposed of. Their Lordships observed that there was no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it. The two decisions relied on were rendered in construing the provisions of the Limitation Act. The article governs the application for the execution of a decree or order of any civil Court, and the starting point of the limitation is given as the date of the final decree or order of the appellate Court It was held that even if the appeal was only against a part of the decree, the date of the appellate decree alone would furnish the starting point of limitation. The view taken in the two decisions was on the construction of the meaning of the words in the article, and is not helpful in deciding the question on hand.

The learned Additional Government Pleader relied on a decision of the Supreme Court reported in *Commissioner of Income-tax, Bombay* v *M/s. Amritlal Bhogilal & Co.*[3] for the proposition that the decision of the appellate authority is the operative

1 (1902) I L R 26 Mad 91, 95 (F.B.).
2 I L R (1932) Cal 61 (P C)
3. (1958) S.C.J. 1007 : (1958) 2 M L J. (S.C) 174 · (1958) 2 An.W R. (S C) 174 · 34 I.T.R. 130 · (1959) S C R. 713.

decision in law, whether it confirms, modifies or reverses the decision of the authority appealed against In the case cited, the assessee firm was granted registration by the Income-tax Officer. The assessee preferred an appeal against the assessment made against him under the Income-tax Act to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner under the Act was empowered to confirm, reduce, enhance or annul the assessment in the appeal The Appellate Assistant Commissioner was not empowered to cancel the order of registration made by the Income-tax Officer The right of appeal is given only to the assessee and no appeal could be filed by the Department against the order of registration of the firm In the circumstances, the Supreme Court held that if any order had been deliberately left out from the jurisdiction of the Appellate Assistant Commissioner, it would not be open to the appellate authority to entertain a plea about the correctness, propriety or validity of such an order. It was further held that if the contention was to be accepted, it would virtually give the Department a right of appeal against the order in question and there can be no doubt that the scheme of the Act was not to give the Department a right of appeal to the Appellate Assistant Commissioner against any orders passed by the Income-tax Officer. The Supreme Court further observed at page 724 .

" If that be the true position, the order of registration passed by the Income-tax Officer stands outside the jurisdiction of the Appellate Assitant Commissioner and does not strictly form part of the proceedings before the appellate authority Even after the appeal is decided and in consequence the appellate order is the only order which is valid and enforceable in laws what merges in the appellate order is the Income-tax Officer's order under appeal and not his, order of registration which was not and could never become the subject-matter of an appeal before the appellate authority The theory that the order of the Tribunal merges in the order of the appellate authority cannot therefore apply to the order of registration passed by the Income-tax Officer in the present case "

This decision, far from supporting the contention of the learned Additional Government Pleader, concludes the case against him. It is no doubt an authority for the proposition that as a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement But the above statement of law is qualified by the observation that what merges in the appellate order under appeal is what was and could be the subject-matter of the appeal before the appellate authority and not any matter which was outside the scope of the appeal before the appellate authority. In the present case the appeal that was preferred against the order of the Deputy Commissioner was by the assessee against the assessment made against him It is admitted that the Sales Tax Department has no right of appeal and the question of the liability of the assessee to tax as an unlicensed dealer in hides and skins was not the subject-matter of appeal before the appellate authority. On the authority of the Supreme Court the theory that the order of the Deputy Commercial Tax Officer merged with the order of the appellate authority cannot apply so far as the subject-matter namely the liability of the assessee as an unlicensed dealer in hides and skins was not before it The learned Additional Government Pleader submitted that the order of assessment should be treated as a single one bringing within it the entire assessable turnover and capable of being set aside either by appeal or revision and that there can be only one final order of assessment all through. The learned Additional Government Pleader relying on the decision in *State of Madras* v. *Indian Coffee Board*[1] submitted that as the order is one and indivisible the assessment of the Deputy Commercial Tax Officer as a whole should be deemed to have been merged in the order of the Commercial Tax Officer. This submission cannot be accepted as it is against the decision of the Supreme Court in *Commissioner of Income-tax, Bombay* v *M/s. Amrit lal Bhogilal & Co*[2]. In *State of Madras* v. *Indian Coffee Board*[1] the assessee was assessed on a turnover of Rs 3,89,38,275 for the year 1949-50 The assessee took the matter on appeal to the Deputy Commercial Tax Officer The appeal was dismissed on 31st May,

1. (1960) 1 M L J 376 I L R (1960) Mad 245.
2. (1958) S C J 1007 (1958) 2 M.L J. (S.C) 174: (1958) 2 An W R (S.C) 174 : 34 I T.R. 130 (1959) S.C R. 713

1951. The assessee took a further appeal to the Sales Tax Appellate Tribunal and the Tribunal confirmed the order of assessment on 24th July, 1952 A revision by the assessee to the High Court was also dismissed by the High Court on 14th April, 1954 After the Tribunal dismissed the appeal on 24th July, 1952, and during the pendency of the revision before the High Court the Deputy Commissioner of Commercial Taxes initiated proceedings *suo motu* under section 12 of the Act to revise the order of assessment confirmed by the Commercial Tax Officer. According to the Deputy Commissioner a sum of Rs 33,73,733 was not entitled to exemption The assessee objected to this assessment by the Deputy Commissioner, but the Deputy Commissioner revised the assessment Against the said assessment by the Deputy Commissioner the assessee preferred an appeal to the Tribunal. The Tribunal held that as the original assessment had been appealed against to the Tribunal and as the matter was taken up further to the High Court on revision, the order of the Commercial Tax Officer should be deemed to have been finally merged in the order of the High Court and that the Deputy Commissioner had no power to reopen the assessment in exercise of his revisional jurisdiction. Against the decision of the Appellate Tribunal the State of Madras preferred the revision. This Court observed at page 250 ·

" If the Tribunal had already passed an order on an appeal by the assessee against the order of the Commercial Tax Officer, it should be anomalous to have another appeal on the same subject-matter, viz , the assessment, to the Tribunal, after the Deputy Commissioner has passed an order in exercise of his revisional jurisdiction with reference to the same assessment Principle and reason suggest that there should be no scope for the Appellate Tribunal adjudicating on the same assessment over again, and that the jurisdiction of the Deputy Commissioner should end when the Appellate Tribunal has passed its order in exercise of its appellate jurisdiction "

It may be noticed that the decision was mainly on the ground that the decision of the Appellate Tribunal became final and that there should be no scope for the Appellate Tribunal to adjudicate on the same assessment over again and that the Deputy Commissioner's jurisdiction should end when the Appellate Tribunal, had passed its order We are in respectful agreement with the view of the Bench for under section 12-A the decision of the Appellate Tribunal is final Under section 12-A, sub-section (9) of the Act subject to the provisions mentioned in the section after the Appellate Tribunal had passed its order there could be no scope for its passing another order over the same assessment or for an inferior authority modifying the order by exercising its revisional jurisdiction. The Bench observed :

"The existence of such a power would show that the whole order of the Commercial Tax Officer forms the subject-matter of the appeal When, therefore, the Appellate Tribunal passes an order under section 12-A (4), the order of the Commercial Tax Officer would be superseded by that of the Tribunal.

From the above observation it was contended that the order of the Appellate Authority superseded the order of the Deputy Commercial Tax Officer and, therefore, the only order that was available for revision was that of the Commercial Tax Officer. We are unable to draw any such inference from the passage quoted above. Further it will have to be noted that the scope and effect of section 12-A of the Act was not under consideration by the Bench in that case The decision reported in *Commissioner of Income-tax* v *Messrs Tejaji Farasram*[1] was next referred to by the learned Additional Government Pleader Chagla, C J , while dealing with an assessment order confirmed by the Appellate Assistant Commissioner of Income-tax held that the order of the Income-tax Officer merged in the order of the Appellate Assistant Commissioner In the case cited the Income-tax Officer passed an order assessing the capital gains of the assessee at Rs 25,000 The assessee preferred an appeal to the Appellate Assistant Commissioner who confirmed the order and dismissed the appeal by the assessee The Commissioner of Income-tax revised the order of assessment by enhancing it to Rs 10,00,000 The Bombay High Court held that by enhancing the assessment to Rs 10,00,000, the Commissioner was not revising the order of the Income-tax Officer, but was revising the order of the

1. I L R (1953) Bom. 887.

Appellate Assistant Commissioner who had confirmed the order of the Income-tax Officer and dismissed the appeal of the assessee It was observed that once an appeal was preferred from the order of the Income-tax Officer and an order was passed in that appeal the order of the Income-tax Officer became merged in the order of the Appellate Assistant Commissioner and when the Commissioner enhanced the assessment he was not revising the order of the Income-tax Officer but revising only the order of the Appellate Assistant Commissioner It was admitted that the Appellate Assistant Commissioner had very wide jurisdiction, and when once an appeal was preferred by the assessee, the power of the Appellate Assistant Commissioner was not confined to only those questions which had been raised by the assessee. In the case before the Bombay High Court the power of the appellate authority to pass an order sought to be made by the revising authority was not in dispute, while, in the case before us, it is admitted that the right of appeal was available only to the assessee and that the appellate authority could never have passed the order which the revising authority purported to make. The theory of merger referred to by the Bombay High Court should be read subject to the qualification laid down by the Supreme Court in *Commissioner of Income-tax, Bombay* v *Messrs Amritlal Bhogilal and Co.*[1], and can only be confined to the subject-matter of the appeal before the appellate authority.

In *Madura Mills Co., Ltd* v *State of Madras*[2], a Bench of this Court held that the general rule that an order of an inferior Tribunal appealed against and confirmed by a superior Tribunal gets merged in the final order on appeal is not of universal application The assessee, Madurai Mills Co, Ltd, returned a turnover of Rs. 15,27,61,883-8-4 for the year 1950-51 The Deputy Commercial Tax Officer assessed the turnover at Rs 15,44,09,109-3-11. The assessee preferred an appeal to the Commercial Tax Officer. The Commercial Tax Officer excluded a sum of Rs. 1,44,294-14-4 In pursuance of the order of the Commercial Tax Officer a revised assessment was made Then the assessee preferred a revision petition to the Deputy Commissioner of Commercial Taxes, in which the only objection he raised was that he should not have been assessed to tax on a sum of Rs 6,57,971-4-9 which he had collected as tax. The assessee did not raise any objection against the order of assessment by the Deputy Commercial Tax Officer or the Commercial Tax Officer in regard to any other matter. The Deputy Commissioner dismissed the revision petition on 21st August, 1954 The Board of Revenue issued a notice on 4th August, 1958, calling upon the assessee to show cause why the assessment should not be revised to include in the net turnover the sum of Rs 7,74,62,706-1-6 as that amount was wrongly excluded by the assessing authority It was contended by the State that under section 12 (4) (*b*) of the Act, the order of the Commercial Tax Officer, dated 28th November, 1952, became merged in the order of the Deputy Commissioner of Commercial Taxes, dated 21st August, 1954, and as the Board of Revenue sought to revise the order within four years on 4th August, 1958, it should be held that the order was within time It was contended on behalf of the assessee that the order sought to be revised was only that of the Deputy Commercial Tax Officer of 28th November, 1952, and was, therefore, out of time The Bench, after considering the various provisions of the Act, held that there was a clear demarcation regarding the scope and ambit of the revisional powers exercisable *suo motu* by the authorities and on application by the assessee It observed that the subject-matter of a revision proceeding started *suo motu* was always the question of enhancement, while the subject-matter in a revision moved by the assessee was always the question whether he was entitled to any relief by way of reducing the assessment Even where both sets of revision proceedings were conducted together in a common enquiry or successively, the subject-matter remained quite distinct and separate In the case before us, it is unnecessary to consider the question whether the subject-matter in revision was the same or distinct and separate, for the order sought to be revised was passed by the appellate authority in exercise of its powers under section 11 of the Act. Dealing

1 (1958) S C J 1007 (1958) 2 M.L J (S C) 174 (1958) 2 An W R (S C) 174 (1959) S C.R 713 34 I T R 130

2 (1963) 1 M.L.J 73 I L.R (1962) Mad 489

with the language of section 12 it was held that there was hardly any scope for invoking the principle of merger of the order of the assessing authority in the order of the revising authority. It was held that the exercise of revisional power could be with reference to portions of orders of assessment, and where portions of the order alone were before the revising authority, the dismissal of the revision petition did not tantamount to a confirmation by the revising authority of other portions of the orders of assessment, which were not before that authority and the subject-matter of the decision of the revising authority moved by an assessee was in no way affected by the potential power of that authority to take action *suo motu* if it thought fit It was further observed that the existence of such a dormant power could not operate to bring about an enlargement of the scope of the actual decision in the matter.

Without expressing any opinion as to the nature of the revisional powers under section 12 of the Act, we are clearly of the opinion that the theory of merger is not applicable, in this case as the order of the inferior Tribunal cannot merge in the appellate order when the order could not form the subject-matter of appeal.

The decision in *Madura Mills Co , Ltd* v. *State of Madras*[1], was referred to and relied on by a recent decision of a Bench of this Court in *Jainulabdeen Sahib* v. *State of Madras*[2] On a consideration of the entire case-law placed before us, we have no hesitation in holding that the theory of merger is not applicable in this case and Board of Revenue could have exercised its powers of revision only within four years from the date of the order of the Deputy Commercial Tax Officer The Act has made elaborate provisions, providing for appeals and revisions and specifying the time within which such reliefs should be asked for. When the Act itself has made specific provisions providing for limitation, there is no justification for travelling outside the Act for fixing the period of limitation The general principle that the order appealed against merges in the appellate order and the appellate order is the only effective and enforceable order is not unqualified in its application It can have no application in a case where the question could not form part of the proceedings before the appellate authority and in which the appellate authority could not have passed an order sought to be made by the revising authority In the present case the Commercial Tax Officer, exercising his appellate powers, could not have assessed the assessee as unlicensed dealer under section 6-A, for the assessee only had a right of appeal and the Department had no right to ask for the enhancement of the assessment To permit the revising authority to enhance the assessment which the appellate authority could not have done, is not in consonance with the scheme of the Act The power of revision conferred under section 12 is restricted and can only be exercised by the authority for satisfying itself of the legality or propriety of the order and the regularity of the proceedings before the inferior Tribunal While purporting to satisfy itself about the legality or propriety of the order, the revising authority cannot pass an order which the appellate authority could not have legally passed

In the result, we see no reason to interfere with the order of Veeraswami, J. The appeal fails and is dismissed with costs.

V.K. *Appeal dismissed.*

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1. (1963) 1 M.L.J. 73. I.L.R (1962) Mad. 489. 2. (1964) 15 S.T.C. 413.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE K VEERASWAMI AND MR JUSTICE T. VENKATADRI.

The State of Madras, represented by the Commissioner for Hindu Religious and Charitable Endowments, Madras and another . *Appellants**

v

Sambandamurthi Mudaliar .. *Respondent*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), sections 70 (1) (i) and 6 (9)—Suit against order of Commissioner—Period of limitation—Computation of—Application for copy of order wrongly made to Deputy Commissioner instead of to the Commissioner—Time lost thereby if can be excluded—Hereditary trustee—Who is—Trustee elected by usage capable of holding office only for a term of years—If a hereditary trustee.

In exercise of the powers under section 116 (2) of the Madras Hindu Religious and Charitable Endowments Act (XXII of 1959) the State Government framed certain rules governing the procedure for grant of certified copies Rule 3 (ii) thereof provided that if an application for a copy is made to a Deputy Commissioner or an Assistant Commissioner of the Hindu Religious and Charitable Endowments and the document is one of which a copy cannot be granted by him, he should forward the application to the Commissioner of the Hindu Religious and Charitable Endowments with his remarks The sub-rule thus pre-supposes that if an application was filed before the Deputy Commissioner, who could not grant the certified copy, it could not, on that account, be regarded as improperly presented.

Where therefore a party aggrieved by an order of the Commissioner, applies, in order to file a suit, for a copy of the order with the annexure, not to Commissioner himself but to the Deputy Commissioner and the latter directs the applicant to apply to the Commissioner, the time lost in making the application to the Deputy Commissioner should be excluded in computing the period of limitation prescribed under section 70 (1) (i) for filing a suit against the order.

The definition of hereditary trustee in section 6 (9) of Madras Act (XXII of 1959) includes three types of cases (i) succession to the office of trusteeship devolving by hereditary right, (ii) succession to such office being regulated by usage and (iii) succession being specifically provided for by the founder, provided the scheme of such succession is still in force

Where a trustee is elected by usage, his office could be regarded as hereditary, but where the office by such election can be held only for a term of years, though by usage, and not for life the office could not be regarded as hereditary within the meaning of section 6 (9).

State of Madras v. *Ramakrishna*, (1957) 2 M L J 252 I L R. (1957) Mad 1084, relied on.

Appeal against the Decree of the Subordinate Judge, Nagapattinam, in Original Suit No 39 of 1961.

Government Pleader (*A Alagiriswami*) and *K S Bhaktavatsalam*, for Appellants.

S. Mohan Kumaramangalam for *R Shanmugham* and *K. Ramachandran*, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J —The defendants are the appellants from a decree setting aside the order of the first defendant, who is the Commissioner, Hindu Religious and Charitable Endowments, Madras, dated 10th May, 1960 by which he confirmed the order of the second defendant, the Deputy Commissioner in the same department, holding that the trusteeship of the Kumaran Koil in Manjakollai village is not hereditary The respondent was elected as a trustee by the Senguntha Mudaliar of Manjakollai village at a meeting held on 27th June, 1957. According to him, the temple was founded two hundred years ago by the members of his community and since then the management of the temple and its affairs has continuously been in the Senguntha Mudaliar community of Manjakollai, and that no person other than one elected as trustee by the community had at any time any right of control and management of the temple and its properties. In 1926, the temple was declared as an *excepted* temple under the provisions of Madras Act I of 1925 The trusteeship of the temple is, therefore, as the respondent would maintain, hereditary. The appellants, however, took a different view of the matter and proceeded on the basis that

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*Appeal No. 276 of 1962. 31st March, 1965.

Kumaran Koil is not one whose trusteeship is hereditary On an application for the purpose made by the respondent, the second defendant, in the first instance, held that the trusteeship of the institution was not hereditary, and an appeal by the respondent to the Commissioner failed, his order being dated 10th May, 1960. He instituted the suit on 9th January, 1961.

In the Court below, two questions were raised · (*i*) whether the respondent is a hereditary trustee as claimed by him, and (*ii*) whether the suit was within time The Court below answered both the questions in favour of the respondent and decreed the suit.

Before us, the learned Government Pleader has reiterated the same two points. We shall first dispose of the second one relating to limitation A copy of the order of the Commissioner, dated 10th May, 1960, was transmitted to the respondent on 18th May, 1960, but since it was not accompanied by the annexure to the order, the respondent applied on 1st June, 1960, to the second defendant for a copy thereof The respondent deposed that he was directed by the second defendant to apply to the first defendant for a copy and thereafter he filed an application to the Commissioner on 25th August, 1960, and actually received a copy of the annexure on 13th October, 1960. It was contended for the department that the suit was out of time since section 70 (1) (i) of Madras Act XXII of 1959 allowed only ninety days from the date of receipt of the order for institution of a suit This will depend upon whether the time lost by the respondent in making an application to the second defendant could be allowed in his favour No doubt, the second defendant could not grant a copy of the annexure, since it related to an order passed by the first defendant. But we find that in exercise of the powers under section 116 (2) (vi) of the Act the State Government framed certain rules governing the procedure for grant of certified copies—*vide* G O. Ms. No. 865, Revenue, 15th February, 1960. Rule 3 (ii) provides that if an application for a copy is made to a Deputy Commissioner or an Assistant Commissioner and the document is one of which a copy cannot be granted by him, he should forward the application to the Commissioner with his remarks This the second defendant does not appear to have done The sub-rule pre-supposes that if an application was filed before the Deputy Commissioner, who could not grant the certified copy it could not, on that account, be regarded as improperly presented for, the sub-rule requires the Deputy Commissioner to transmit it to the Commissioner with his remarks so that it could be complied with We are, therefore, of the view that the respondent is entitled to credit for the time taken between 1st June, 1960 and 25th August, 1960, for, if the application had been transmitted by the second defendant, as required by the rules, to the Commissioner, no question of any bar of limitation could have arisen. It follows, the suit was instituted in time.

On the first point argued before us as to the nature of the trusteeship of the suit institution, the Court below, on the evidence before it, found that over a long period of years the trustee to the institution was elected by and from the Senguntha Mudaliars of Manjakollai and that the respondent was such a representative chosen by the Manjakollai Senguntha Mudaliars in pursuance of the long usage. It was, therefore, of the view that the trusteeship was hereditary within the meaning of section 6 (9) of Madras Act XIX of 1951. This Act has since been substituted by Madras Act XXII of 1959 but the definition of *hereditary trustee* is identical in both the Acts. Section 6 (9) is as follows :

> " Hereditary trustee means the trustee of a religious institution succession to whose office devolves by hereditary right or is regulated by usage or is specifically provided for by the founder, so long as such scheme of succession is in force "

The definition read in the same way even before 1951 with this limited difference that before, it included the case of succession to the office by nomination by the trustee for the time being The definition, as we find to-day, includes three types of cases, (i) succession to the office of trusteeship devolving by hereditary right, (ii) succession to such office being regulated by usage and (iii) succession being specifically provided for by the founder, provided the scheme of such succession is still

in force In the second category of cases, the question had arisen in one or two cases before this Court as to whether, where a trustee is elected by usage, his office could be regarded as hereditary The latest of them is *State of Madras* v *Ramakrishna*[1]. There the management of Sri Parthasarathi Swami temple is governed by a scheme settled by this Court in 1924 The scheme provides that the dharmakarthas shall be three in number and shall hold office for a period of five years from the date of appointment. The mode of appointment is by election by persons whose names are included on the date of election in the list of voters maintained by the temple The qualifications for such voters are also mentioned in the scheme When a vacancy arose in one of the places of the dharmakarthas the Commissioner for Hindu Religious Endowments filled it up by exercising his power of appointment under the provisions of Act XIX of 1951, the validity of which was contested by means of a petition under Article 226 of the Constitution Subba Rao, J (as he then was) quashed the order of appointment on the view that section 42 of that Act had no application as the trustees of the temple were hereditary trustees On appeal under the Letters Patent a Division Bench considered that though the scheme recognized the earlier usage of electing trustees the language *is regulated by usage* in the definition of *hereditary trustees* would not be applicable to a temple if succession to the trusteeship was regulated by usage but is no longer regulated by usage Though this was sufficient to dispose of the appeal, the learned Judges proceeded to consider the precise scope of the word *succession* in the definition in the context of the language *is regulated by usage* They were prepared to hold that succession to an office of trustee by election may well be comprehended by section 6 (9). But at the same time they were of the view that were the office of trusteeship by election can be held only for a term of years, though by usage, it could not possibly be brought within the purview of this provision. They expressed their view in the following words (at page 1090).

> " It appears to us to be singularly inappropriate to say that there is a succession of *A*'s office to another when on the efflux of the period for which *A* was appointed, there is a vacancy and *B* is elected to that vacancy It is quite possible that for that vacancy *A* himself might be re-elected because a retiring trustee is eligible for re-election The possibility of *A* being the successor of *A* himself is not merely an anomaly, it is an impossible legal position No man can succeed to his own office."

That is precisely the case here Though the observations of the Division Bench in that case were *obiter*, because the appeal was disposed of on the other point, we are, with great respect, in agreement with those observations.

Mr Mohan Kumaramangalam for the respondent realized the force of the observations in that case and that they would govern the instant case. But learned Counsel argued that the limited interpretation placed in that case on the word *succession* requires reconsideration He says that if election to the office of trusteeship is regulated by usage and if that falls within the ambit of *succession*, there is no reason to limit its scope to election to an office which will be held for life and not for a period of years *Succession* which is contemplated by the definition is to an office and there is no anomaly, according to the learned Counsel, in *A* succeeding to *A*'s office, if the appointment to the office is by election and the duration of the office is regulated by usage Where the office itself can be held, according to usage, for a term of years, it is not impossible for *A*, who is re-elected as a trustee, to continue to hold that office in succession It is said that *succession* in the sub-section is not used with reference to the practice sanctioned by usage But what is important to note is that the definition is that of a *hereditary trustee* and is in terms of succession to the office as regulated by usage While *succession* indicates continuity, it also implies that it is from one to another. It looks to us to be inappropriate and odd that *A*, who has been elected as a trustee succeeds to the office of the trusteeship when he is re-elected The same person cannot succeed to himself when re-elected ; he continues in office and not succeeds to it Following *State of Madras* v *Ramakrishna*[1], therefore, we hold that, although the respondent was elected in accordance with

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1. (1957) 2 M L J 252 . I L R (1957) Mad. 1084

the usage, inasmuch as the office can be held only for a term, he cannot be regarded as a hereditary trustee.

The appeal is allowed and the decree of the Court below is set aside The appellants will be entitled to their costs throughout.

V.K. —— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE M. NATESAN.

T. S Devaraja Gramani . *Petitioner**

v.

Murugesan . *Respondent*

Madras City Tenants' Protection Act (III of 1922), as amended by Madras Act (XIX of 1965), sections 3 and 9—Lessee of vacant site erecting superstructure thereon—Sale of superstructure by lessee without assignment of tenancy —Purchaser, however, attorning to landlord prior to 1955—If entitled to claim benefit of section 9—" Predecessor-in-interest " in section 3—Meaning of

Where a lessee of a vacant site erects a superstructure thereon and thereafter sells the superstructure to another without, however assigning the tenancy and subsequently but before the coming into force of Madras Act XIX of 1955, the purchaser attorns to the lessor and thereafter begins to pay rent to the lessor for the land alone, the purchaser would be entitled to claim the benefit of section 9 of the Madras City Tenants' Protection Act, 1922 as amended in 1955 In such a case it cannot be said that the purchaser, having only purchased the superstructure and not having an assignment of the leasehold right from the lessee, cannot claim any benefit under the Act The contention that when the purchaser attorned to the landlord there was already a building on the land, that the land would therefore be a part of the building and that consequently the purchaser cannot be a tenant of the " land " under the Madras City Tenants' Protection Act, is clearly untenable The principle that a site built upon becomes part of the building is not an abstract principle of law applicable under all circumstances Its applicability will depend on the provisions of the Act under consideration in relation to the facts and particularly the concept of building in the provision that has to be construed The legislative intent emerging from the Act read as a whole has to be kept in the background.

The " land " dealt with under the Madras City Tenants' Protection Act is land built upon with appurtenant land Still it is provided in section 2 (2) that land does not include building The provisions of the Act relating to compensation for the building cannot in the nature of things embrace the land built upon and wherever the Act refers to ' building ' it is proper to exclude from the conception of building the treatment of the site built upon as part of the building It is an accepted canon of construction that the same word, unless the context compels or otherwise requires, will bear the same meaning throughout the Act

Nor has the contention any force that the original lessee who put up the superstructure, not having assigned the tenancy but having only sold the building, was not the purchaser's 'predecessor-in-interest' within the meaning of that term in section 3 so as to entitle the purchaser to claim the benefit of section 9. There is no reason for limiting the scope of the phrase ' predecessor-in-interest' in section 3 It is not necessary that the tenant in occupation must come in as tenant by privity of interest in the tenancy with the prior tenant who put up the structure, in order that the latter may be deemed to be a ' predecessor-in-interest '. The term should be understood only as meaning " one that went before him in interest "

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of Small Causes (Chief Judge), Madras dated 18th January, 1964 and made in Ejectment Appeal No 25 of 1963 (M P No 971 of 1961, in Ejectment Suit No 158 of 1961 on the file of the Second Judge, Court of Small Causes, Madras).

V. C. Veeraraghavan and *M D Lakshminarasimhan*, for Petitioner

P S Chinnappa, for Respondent.

The Court delivered the following

JUDGMENT.—This revision is directed against the order of the appellate Court allowing an application under section 9 of the Madras City Tenants' Protection Act, 1922, hereinafter referred to as the Act The landlord who is the petitioner before me instituted a proceeding in ejectment under section 41 of the Presidency Small Cause Courts Act, impleading therein the present respondent who claims to be a tenant under the said Act and one Thulukanathammal as defendants The res-

*C.R.P. No. 801 of 1964. 25th February, 1966.

pondent was impleaded as the second defendant in the suit as a person unauthorisedly seeking to put up a superstructure on the property Thulukanathammal was shown as the first defendant and impleaded as a tenant of the land under the plaintiff The plaint proceeded on the allegations that Thulukanathammal never put up any superstructure thereon and that in January, 1961, the present respondent came on the land as having been inducted thereon by her and started putting up a superstructure

In the enquiry that followed the application of the present respondent for relief under section 9 of the Act, it has now been found that these averments of the plaintiff are false It is brought out in the evidence that the superstructure has been there from prior to September, 1955 when the City Tenants' Protection Act was amended Thulukanathammal was originally a tenant under the plaintiff, the lease deed showing the tenancy being Exhibit B-1 dated 12th September, 1953 The purpose of the lease was to enable the lessee to put up a hut thereon The present respondent, the applicant under section 9 of the City Tenants' Protection Act, became the purchaser of the superstructure on 12th September, 1953 itself from the said Thulukanathammal The Appellate Authority examining the evidence has come to the conclusion that it had been established beyond doubt that the respondent was residing in the hut on the suit plot prior to 1955 from about the time of his purchase in 1953 and that he had been paying rent to the plaintiff The conclusion of the appellate Court is, that the respondent had been a tenant under the plaintiff from about 1953 and was therefore entitled to relief under the Act On this finding, the matter has been remanded to the trial Court for further steps and proceedings under the Madras City Tenants' Protection Act, 1922 as subsequently amended The finding that the respondent is a tenant and that the structure had been on the land even long prior to 1955 being findings of fact are naturally not open to challenge.

Learned Counsel Mr. V C Veeraraghavan, appearing for the plaintiff-landlord attacks the order of the Court below on a new basis not put forward in the Courts below which has some jurisdictional flavour in it The learned Counsel contends that as the respondent purchased only the superstructure from Thulukanathammal, and had not got an assignment of the leasehold right from her, he cannot claim any benefit under the Act The argument is elaborated thus. Under the Act, only a tenant is entitled to the benefits under the Act Assuming that subsequent to his purchase of the superstructure, the respondent attorned to the landlord and he was treated as a tenant when this tenancy of the respondent came into existence, there was already a building on the land and the land would therefore be a part of the building The tenancy of the respondent, in the circumstances, would not be a tenancy of the land and therefore he cannot claim to be a tenant of the 'land' under the Act Learned Counsel would contend that for a succeeding tenant to be entitled to benefits under the Act, he must be an assignee not only of the superstructure from the prior tenant, but must be an assignee of the leasehold interest also It is contended that in such a case only, it could be held that a relationship of landlord and tenant had continued unbroken It is contended that even if one tenant follows another in occupation without break but without the tenancy itself being transmitted the change would destroy the tenancy of the land sufficiently to make the Act inapplicable This contention meets only a case where the prior tenant leaves the structure whole to the next tenant But I suppose it will yield to a case where the subsequent tenant has dismantled the hut he had purchased and closely following on the heels of his predecessor re-erects it It must be noted that no claim is put forward that in the process of one tenant succeeding another without an assignment of the tenancy, the landlord has become the owner of the superstructure despite its transfer between the tenants.

I am unable to accept the subtle distinction in the devolution of rights. When protection is granted under a statute, it could be taken away only on substantial principles of law that could co-exist, with the rights conferred True, if the respondent's tenancy had not been recognised before the Act was amended in 1955,

he would only be an owner of the superstructure, and would not be entitled to any protection under the Act But I cannot understand how it could be contended that the landlord has leased a building when he had no ownership in the superstructure. There has been no augmentation of his rights in the land by the building apart from what the Act has chosen to recognise or define and the several provisions of the Act like sections 4, 5, 6 and 7 meticulously maintain a distinction.

The question not having been raised in this form, the lower Court has not adverted to certain other vital evidence in this case, in the face of which this contention may not even be tenable The respondent has deposed that Thulukanathammal never lived in the hut and in fact one Murugan who was living on the site thereon had originally put up a hut It was during his occupation that Thulukanathammal got a lease of the land and immediately he purchased from her the right to the superstructure Ever since he was paying the ground rent to the landlord Thulukanathammal has given evidence as P W 2 and it is not her case that the respondent was her tenant She speaks to selling the house to the respondent It must also be noticed that when Thulukanathammal sold the superstructure to the respondent, she was selling the superstructure as a house and not a brick mortar, rubble and thatching materials The document evidencing the sale refers to the fact that the ground was under lease On the finding that the landlord has recognised the tenancy of the respondent and as the landlord has no interest in the superstructure, the tenancy can only be of the land He has been receiving only the ground rent therefor It may be that the land has become part of a building as the building cannot retain its character as building without the land but the interests of the landlord in the premises is in the land, the ownership in the superstructure and land remaining severed. No doubt as observed by a Division Bench of this Court in *Subramania Naicker* v. *Muthuvel Chetty*[1], mere possession of the superstructure by a purchaser without any tenancy in respect of the land on which the superstructure stands cannot confer on the appellant any right under the Act The following observations of the Bench in my view, indicate that once the owner of the superstructure is accepted as tenant by the landholder, the tenant would be entitled to claim the benefits under the Act Their Lordships Rajamannar, C J, and Ramachandra Iyer, J, observed .

" Mere possession of the superstructure without any tenant in respect of the land on which the superstructure stands cannot confer on the appellant any right under the Act Indeed it is clear that the appellant (second defendant) cannot claim to be legally a tenant of the land under anyone He attempted to attorn to the plaintiff but the plaintiff would not accept him as his tenant There is, therefore, no valid defence open to the second defendant-appellant to the claim of the plaintiff for possession of the land "

The question has to be considered with reference to the definition of "landlord" and "tenant" in the Act and the other provisions of the Act 'Land' is defined under section 2 (2) of the Act as not including buildings. The definition of landlord material for the present purpose runs thus ·

" 'Landlord' means any person owning any land, and includes every person entitled to collect the rent of the whole or any portion of the land . "

The definition of "tenant" relevant for our present purpose runs thus :

" 'Tenant' in relation to any land—

(i) means a person liable to pay rent in respect of such land, under a tenancy agreement expressed or implied, and

(ii) includes (*a*) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement, and (*b*) the heirs of any such person as is referred to in sub-clause (i) and sub-clause (ii) (*a*) , but does not include a sub-tenant or his heirs "

The contention of the learned Counsel for the landlord before me that the land built upon must be deemed to be part of the building is not founded on the basis of any agreement between the parties but is a purely legal submission I cannot see how to accept the submission in the face of the clear and unequivocal definition of the word "land" as not including building The principle that a site built upon becomes part of the building is not an abstract principle of law applicable under all circumstances Its applicability will depend on the provisions of the Act under

1 L. P A No. 11 of 1956 (unreported).

consideration in relation to the facts and particularly the concept of building in the provision that has to be construed. The legislative intent emerging from the Act read as a whole has to be kept in the background The ' land ' dealt with under the Act is land built upon with appurtenant land Still it is provided that land does not include building The provisions of the Act relating to compensation for the building cannot in the nature of things embrace the land built upon and wherever the Act refers to ' building ' it is proper to exclude from the conception of building the treatment of the site built upon as part of the building It is an accepted canon of construction that the same word, unless the contest compels or otherwise requires, will bear the same meaning throughout the Act

Dual and several ownership of land and building and tenancy of land without tenancy of the building are not unknown In this connection, reference may be made to the decision of the Supreme Court in *Dr K A Dhairyavan* v *J R Thakur*[1], a case under the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 Under that Act, occupation of land used for non-agricultural purposes was also protected To set out the facts of the case in skeletal form . the lessee had put up the superstructure on the land which he had taken on lease and had covenanted to surrender and yield up the demised premises including the building with its fixtures and appurtenances to the lessors without any compensation for the same Under the Act which was passed subsequent to the lease, the lessee got protection in respect of the land but not in respect of the building thereon as he was not a lessee of the building By the covenants in the lease the lessor became the owner of the building on the expiry of the covenanted lease period In these circumstances, the Supreme Court, while recognising the right of the lessee to continue in occupation of the land recognised the right of the lessor to the building on the land and declared his rights to the rents and profits from the building, observing at page 794 .

"It was next urged that even if there had been no demise of the building to be erected on the land, possession of it could not be given to the appellants until the lease had been determined which in law, could not be determined so long as the respondents could not be evicted from the demised land of which they were tenants within the meaning of the Act This contention is without force as the provisions of the Act do not provide for the continuation of a lease beyond the specified period stated therein All that the Act does is to give to the person who continues to remain in possession of the land although the period of lease had come to an end, the status of a statutory tenant That is to say, although the lease had come to an end but the lessee continued to remain in possession without the consent of the lessor, he would none the less be a tenant of the land and could not be evicted save as provided by the Act "

If the principle now pressed is generally available, it could with equal felicity have been argued there that the building was part of the land under lease. Land under certain circumstances has been held to include buildings thereon.

Learned Counsel for the petitioner referred to the decisions of this Court under the Madras Buildings (Lease and Rent Control) Act in *Ramaswami Pathan* v. *J K. Devasthanam*[2], and *Palaniappa Chettiar* v. *Vairavan Chettiar*[3], where it has been held that though the actual lease was of the site alone, if the superstructure was in existence at the time the lease was granted it can be regarded as a part of the building and not of a vacant site Under the aforesaid Madras Act tenancy of land as such was not protected, and land was not separately defined or considered In my view, decisions under a different Act cannot be called in aid in applying the provisions of the Madras City Tenants' Protection Act, 1922

Learned Counsel referred to the observations in *Naraindas* v. *Venkataswami Naidu*[4] a decision of the Division Bench under the Madras City Tenants' Protection Act wherein the building was put up when there were prohibitory covenants in force against building on the land While repelling the claim to protection under the Act on a presumed subsequent tenancy of the land by the continuance in possession of the tenant after the termination of the old lease, their Lordships observed that a lease of the site after the construction of the building will not amount to lease of the land as such and that land by that time had become part of the building and it will then be a lease of the building The observatins are binding on me but the building

1. (1958) S C J 1060 · A I R. 1958 S C 789.
2. (1963) 1 M.L J. 60.
3. (1963) 1 M L J 130
4. (1963) 1 M.L J. 140.

in that case was held as one not entitled to protection under the Act, and the facts in the present case are different and secondly the Supreme Court has since in *Venkataswami Naidu* v *Narasaram Narayan Das*[1], reversed the decision

Counsel for the landlord referred to another unreported decision of this Court in *Kumari Tara Bai* v *Kanakavelu Mudaliar*[2]. The learned Judge Veeraswami, J , has in that case no doubt following the aforesaid decision of this Court, relied on the principle that where on the date of coming into existence of a tenancy there is a building though not belonging to the lessor, the lease has to be regarded as a lease of the building and the site, because once the building is put up, it becomes part of the site The case no doubt arose under the City Tenants' Protection Act, but the case is distinguishable on facts It is a case of a sub-tenant who had no *locus standi* under the Act that had put up the superstructure He was not a tenant of the owner of the land and would not be entitled to benefits under the Act against the owner.

The matter may be considered from another angle, and this is the approach which the Supreme Court has directed in *Venkataswami Naidu* v *Narasaram Narayan Das*[1]. The person who is entitled to purchase under the provisions of section 9 of the Act is the person who is entitled to compensation under section 3 of the Act The question really turns upon the determination whether the respondent could claim compensation under section 3 The relevant portion of section 9 runs thus

" Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted or proceeding under section 41 of the Presidency Small Cause Act, 1882 taken by the landlord may . apply to the Court for an order that the landlord shall be directed to sell the extent of the land to be specified in the application. "

Section 3 reads thus :

" Every tenant shall on ejectment be entitled to be paid as compensation the value of any building, which may have been erected by him, by any of his predecessors-in-interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid A tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land and for any improvements which may have been made by him. "

The first question for consideration would be whether the present respondent is entitled to be paid compensation on ejectment If he is, then he will be entitled to apply for purchase of the land under section 9. Admittedly the tenant is the purchaser of the superstructure. He is a person liable to pay rent only in respect of the land on which the superstructure has been raised Section 3 speaks of compensation for the value of the building. As stated earlier it can refer only to the structural part of the building and does not take in the land Section 3 provides for payment of compensation to the tenant even though the building might have been erected by his predecessor-in-interest provided compensation has not already been paid. With reference to the construction of this section learned Counsel for the petitioner contends that the respondent herein not being an assignee of the tenancy but only a purchaser of the building, it cannot be said that the person who put up the structure thereon was his predecessor-in-interest I see no reason for limiting the scope of the phrase ' predecessor-in-interest '. The person who put up the building in this case, according to the finding, is Thulukanathammal The respondent on the finding derives his title to the building from her. In Ramanatha Ayyar's Lexicon ' Predecessor ' is explained thus .

" One who has preceded another . . . In the common acceptation ' Predecessor ' means one who goes before or precedes another in a given state, position or office and does not necessarily express any relation to legal privity. "

Applying this meaning it is not necessary that the tenant in occupation must come in as tenant by privity of interests in the tenancy with the prior tenant who put up the structure that the latter may be deemed to be a predecessor-in-interest.

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1. (1965) 2 S.C.J. 880.
2. S.A. No. 627 of 1962.

Language almost identical with the language of section 3 is found in section 5 of the Malabar Compensation for Tenants Improvements Act (Madras Act I of 1900). The relevant part of that section reads thus

" Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor-in-interest or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid "

In *Thurpan* v *Mamad Kasim Sait*[1], with reference to the said section 5 of the Malabar Compensation for Tenants Improvements Act it is observed by a Division Bench of this Court :

" It is quite sufficient that the improvements are on the land even if they were made by some previous occupant and it was not the case of either party that anybody except the second defendant was in occupation at the time of the suit. "

In *Kunhunni Nair* v *Raman Menon*[2], another Division Bench decision while considering the meaning of the expression 'Predecessor-in-interest' in the said section 5, the following observations of Mr. Justice Sundara Ayyar in his Malabar Law were accepted:

" The words cannot be said to adequately describe the class of persons for whose improvements the tenant in possession is entitled to claim compensation Unless the word ' Predecessor-in-interest ' is understood in a somewhat loose way, the section may not include many cases which must obviously have been intended to come within it. . . . . To cover obvious cases it may be necessary to understand the word ' Predecessor-in-interest ' as the derivation of the word suggests as meaning ' one that went before him in interest ', some ' tenant ' as understood by the Act who preceded him in occupation either immediately or mediately through others without the continuity being broken up by the intervention of the plaintiff "

In my view, the same wide meaning should be given to the word ' Predecessor in-interest ' in section 3 of the Act The fact that it is not found in this case that the respondent is not an assignee of the tenancy from Thulukanathammal is therefore immaterial Both the definition of tenant as well as the scope of section 3 are wide in their terms and would clearly take in a person like the respondent who has been found to be the owner of the superstructure, and a tenant of the land prior to the 10th of September, 1955 If that much is found, it follows that he will be entitled to apply for sale of the land under section 9 of the Act

I see no reason to differ from the determination of the lower Court that the respondent is entitled to the benefits of the Madras City Tenants Protection Act and that he is entitled to relief under section 9 of the Act The order remanding the matter to the Court of first instance for appropriate further steps under the Madras City Tenants Protection Act has therefore to stand The revision fails and is dismissed and in the circumstances there will be no order as to costs.

V K. *Petition dismissed.*

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1. 17 I.C. 433.
2. (1929) 54 M.L.J. 179.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K. VEERASWAMI, MR. JUSTICE P. KUNHAMED KUTTI AND MR JUSTICE M NATESAN

Sheik Ali .. *Appellant**

v.

Sheik Mohamed .. *Respondent.*

Civil Procedure Code (V of 1908), *section* 44-*A and Limitation Act (IX of* 1908), *Articles* 181, 182 *and* 183—*Execution of foreign decree of reciprocating territory, in India—Limitation—Three years under Article* 181 *applicable—Right to apply for execution accrues from the date of filing of the certified copy of the foreign decree in the District Court—" As if it had been passed by the Disrict Court"—Fiction enacted in section* 44-*A* (1) *of the Code—Nothing to do with limitation—Jurisdiction of the District Court—Arises on the filing of the certified copy of the foreign decree—Filing of the certificate of non-satisfaction—Requirement not a condition for assumption of jurisdiction, but merely procedural—Filing of a certified copy of foreign judgment—No period of limitation prescribed —Article* 183 *of the Limitation Act—Applies only to execution of decrees of Court established by Royal Charter in India—Article* 182 *confined to decrees passed by Courts in India.*

Interpretation of statutes—Fiction—Limited to purpose enacted—Not to be extended.

The respondent obtained a judgment against the appellant in the High Court of Penang on 4th January, 1954 The Supreme Court of Malaya, pending appeal, directed the appellant to furnish security on or before 31st July, 1954, and ordered that in default the appeal was to stand dismissed. The appellant defaulted in furnishing security The respondent applied for and obtained a certificate of non-satisfaction on 7th December, 1954. On 3rd December, 1959, he filed a certified copy of the foreign judgment together with a copy of the certificate of non-satisfaction and an execution petition in the District Court of Thanjavur. In the meanwhile on the application of the respondent the Appellate Court passed a formal order striking out the appeal on 23rd February, 1960 The District Court of Thanjavur ordered attachment on 13th July, 1960, holding that under Article 182 (2) of the Limitation Act the execution petition was not barred on the basis that the order of the Appellate Court, dated 23rd February, 1960, was the final order. Pending an appeal in the High Court of Madras, the appellant applied to the Malaya Court and obtained an order which set aside the order, dated 23rd February, 1960, explicitly making it clear that the appeal in the Supreme Court of Malaya stood automatically dismissed on 31st July, 1954. On a reference to the Full Bench at the instance of the Division Bench.

Held, Article 181 of the Limitation Act is the only Article that applies to the execution of a foreign judgment under section 44-A (1) of the Code. The language in Column (1) in the Article is not related to any particular Court The limitation of three years prescribed thereunder commences when the right to apply accrues and the right to apply accrues under Order 21, rule 11 of the Civil Procedure Code for execution of a foreign judgment on and from the date of filing of a certified copy of a foreign decree under section 44-A (1) of the Code in the District Court in India.

Article 183 is applicable only to execution of decrees of a Court established by Royal Charter in this country Article 182 is not also applicable because it is confined to execution of a decree or order of a Civil Court in this country.

Section 44-A (1) of the Code is confined to the powers and manner of execution of foreign decrees and has nothing to do with the law of limitation. The fiction created by the sub-section by the words ' as if it has been passed by the District Court ' goes no further and is not for all purposes, but is designed to attract and apply to execution of foreign judgments, by the District Court its own powers of execution and the manner of it in relation to its decree and without reference to any question as to limitation

The decision of the Bench in *Uthamarama* v. *Abdul Kassim and Co.,* (1963) 2 M L J. 412, in this respect held to be incorrect.

When a statutory provision creates a fiction, it is first necessary to find out the purpose for which it was created, in order to understand the scope and implication of the fiction.

The whole purpose of the fiction created by the words ' as if it had been passed by the District Court ' in section 44-A (1) of the Code, clearly, in the context of the preceding sections, appears to determine or fix the particular District Court in India to execute the foreign decree or judgment and attract to its execution by such Court the manner of procedure that governs execution of its own decrees. The purpose and ambit of the fiction go no further.

The law of limitation as contained in the Limitation Act as a procedural law and as *lex fori,* will, however, apply, independently of section 44-A (1) to execution in India of a foreign judgment of a superior Court in a reciprocating territory But the effect of its application is a different thing which is a matter of construction

The jurisdiction of the District Court in this country to execute a foreign judgment arises from and is exercisable by the filing of a certified copy of the foreign decree or judgment It is only thereafter, and never until then the procedural laws as to *lex fori* will be attracted to execution The Limitation

* A.A.O No. 286 of 1960. 18th March, 1966.

Act can apply possibly to such execution only after filing a certified copy of the foreign decree or judgment as required by section 44-A (1)

Section 44-A (1) of the Code does not require the filing of a non-satisfaction certificate as a condition for the District Court to assume jurisdiction The requirement relates merely to procedure

The decision in *Uthamrama* v *Abdul Kassim and Co*, (1963) 2 M L J 412 in this respect is incorrect.

There is no limitation for filing a certified copy of a foreign decree or judgment under section 44-A (1) of the Code

Case-law discussed

Appeal against the Order of the District Court of East Thanjavur, at Nagapattinam, dated 13th July, 1960, and made in E P. No 28 of 1960 (C S No 53 of 1946 on the file of the Penang High Court)

The appeal was first heard by a Division Bench (*Srinivasan* and *Ramakrishnan, JJ*)

K Rajah Ayyar, K Hariharan and *Habib Mohamed*, for Appellant.

V. K Thiruvenkatachari, D Ramamurthi, for Respondent

The Order of the Court was made by

*Srinivasan, J.**—Against the appellant in this appeal, the respondent had obtained a decree in C S No 53 of 1946 of the Penang High Court After obtaining a certificate of non-satisfaction from that Court, the decree-holder-respondent sought to execute the decree by attaching certain properties within the jurisdiction of the District Court, Nagapattinam The judgment-debtor contended that the decree of the High Court of Penang cannot be executed by the District Court and that the execution petition is barred by limitation The learned District Judge held that since the High Court of Penang and the Supreme Court of the Federated Malay States have been notified by the notification of the Government of India as Courts in a reciprocating territory, the District Court could proceed with the execution by reason of section 44-A of the Civil Procedure Code Another contention was that since the decree sought to be executed was passed on 4th January, 1954, that date would be the starting point of the period of limitation The learned District Judge accepted the plea that as, it was not shown that the High Court of Penang had been established by Royal Charter, Article 183 of the Limitation Act would not apply. He next proceeded to hold that though the decree was passed by the High Court of Penang on 4th January, 1954, an appeal had been taken to the Supreme Court which received final disposal only on 23rd February, 1960. Limitation had to be computed only from that date and applying Article 182 (2), he concluded that the execution petition which had been presented before the District Court even on 3rd December, 1959, was not barred by limitation. The learned District Judge accordingly directed attachment proceedings to be taken.

It is against this judgment of the District Court of Nagapattinam that the present appeal has been filed.

After the filing of this appeal, Mr K Rajah Iyer, learned Counsel for the appellant-judgment-debtor, obtained an adjournment in order to enable him to apply to the Supreme Court of Malaya to set aside the decree of 1960, that is, the decree dismissing the appeal against the decree passed by the High Court of Penang The Supreme Court of Malaya pronounced judgment on the 21st of October, 1963, as a result of which the order made by it on the 23rd of February, 1960, purporting to dismiss the appeal against the judgment and decree of the Penang High Court now under execution, was set aside. In order to appreciate the effect of this judgment, certain further facts have to be stated.

The judgment and decree obtained by the respondent was on the 4th of January, 1954 The judgment-debtor filed an appeal in the Supreme Court and sought for stay By an order of the Supreme Court dated 31st of May, 1954, stay was granted on condition that the judgment-debtor gave security for the taxed costs

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* 27th July, 1964.

of 5453 and odd dollars and further security for the costs of the appeal in a sum of 1,000 dollars, such security to be furnished on or before the 30th day of June, 1954. Apparently, a sum of 500 dollars was paid by the judgment-debtor, which was directed to be received by the Court as security for the costs of the appeal. The terms of the conditional order were not complied with By a further application, the judgment-debtor sought for extension of time, and time was so granted for compliance with the conditions till the 31st day of July, 1954, and it was further ordered by the Supreme Court that "if the appellant made default in giving such security by the date aforesaid, the appeal would be dismissed with costs" The appellant-judgment-debtor did not avail himself of the extension of time and did not comply with the condition, but apparently no formal order of dismissal of the appeal was made at that time

On the 27th of November, 1954, the decree-holder moved the Supreme Court. In his affidafit, he stated that since the appellant had failed to comply with the conditions, the appeal stood dismissed and he sought in that application for the issue of a certificate of non-satisfaction in order to enable him to forward the judgment for execution in India He appears to have been granted such a certificate

As stated, he filed the execution petition in the District Court of Nagapattinam on the 3rd of December, 1959

The District Court took the petition on file but directed that the decree of the dismissal of the appeal should be furnished It was thereafter that the decree-holder moved the Supreme Court and the Supreme Court made an order on 23rd February, 1960, to the effect "Appeal struck out" The judgment-debtor had not opposed those proceedings, though he appeared by Counsel

It would accordingly appear that the date of dismissal of the appeal by an order of the Court was 23rd February, 1960 The contention raised by the judgment-debtor was however that the dismissal was for non-prosecution and that in terms of the order that was passed by the Supreme Court granting stay, the appeal stood dismissed at least on the 30th of July, 1964, when the conditions were not complied with It was on that footing that it was alleged that the decree was barred by limitation and could not be executed here The learned District Judge however was not inclined to accept that plea.

After the filing of the appeal in this Court, the judgment-debtor moved the Supreme Court and obtained an order setting aside the formal order dismissing the appeal dated 23rd February, 1960 The position accordingly is that the appeal was in fact dismissed by the Supreme Court of Malaya some time in 1954.

Mr Rajah Iyer, appearing for the appellant, contended that the date of dismissal of the appeal by the Supreme Court was on the 31st of July, 1954 Since the execution petition was filed in the District Court of Nagapattinam on 3rd December, 1959, it was out of time It is claimed that it is Article 182 of the Limitation Act, that applies Since this Article provides for three years, Mr Rajah Iyer contends, that treating the decree under execution as one passed by the District Court, Nagapattinam, the execution petition should have been filed within three years from the 31st of July, 1954 Support for this proposition is sought from a judgment of a Bench of this Court in A A O No 86 of 1961, which has since been reported in *Uthamarama* v *Abdul Kassim and Co* [1]. At this stage, we may broadly state that this decision does indeed support the proposition advanced by Mr Rajah Iyer That case referred to a decree of the High Court of the Colony of Singapore, dated the 2nd October, 1953 There was a supplemental judgment dated 25th May, 1954 The decree-holder filed an application in the District Court of Thanjavur on the 16th of August, 1958, obviously beyond a period of three years, computed from the date of the later of the two judgments of the foreign Court. The decision in that case was that for purposes of section 44-A of the Civil Procedure Code, which is the law in regard to the enforcement of judgments of superior Courts

1. (1963) 2 M L J. 412.

of foreign countries situate in reciprocal territories, the decree sought to be put into execution should be deemed to be a decree of the District Court assuming so much, the learned Judges held that Article 182 of the Limitation Act would automatically apply It accordingly followed that since three years had elapsed since the date of the decree, the execution petition was barred by limitation

On the other hand, the learned Advocate-General, appearing for the decree-holder, contends that where under a reciprocal arrangement the Government of this country undertook to execute decrees of foreign Courts, it would be illogical to apply rules of limitation of this country to the decree *before it was brought here for execution* To do so would result in the position that even on the date on which it was filed for execution in a Court of this country, the decree had become barred. The learned Advocate-General refers to section 44-A (2) of the Civil Procedure Code, which states that when once a certificate from the superior Court of the reciprocal territory is produced, stating the extent to which the decree has been satisfied or adjusted, such a certificate shall be conclusive proof of the extent of such satisfaction or adjustment The words ' conclusive proof' are emphasised by the learned Advocate-General, and he urges that the Court would not have granted a certificate unless on the date of the grant of the certificate, the decree was alive and was capable of being put into execution The question to ask, so argues the learned Advocate-General, would be: Was the decree barred in the country of its origin on the date it was brought here for purposes of execution ? If it was so barred, then no question arises but that the Courts of this country could not also execute it. But, if it was not barred in that country, would it be logical to apply the rules of limitation of this country and deny execution ? Would it not conflict with the principle of reciprocity which forms the basis of section 44-A ? He has referred to certain decisions and urges that in the light of those decisions (to which we shall presently refer), the view taken by the Bench in *Uthamarama* v. *Abdul Kassim and Company*[1], requires reconsideration

We have carefully considered the arguments of the learned Advocate-General and we are of the view that the matter does deserve a further examination We shall briefly record the reasons for our reaching that conclusion

Part III of the Civil Procedure Code deals with several modes in which a decree can be executed A decree may be executed by the Court which passed it or by the Court to which it is sent for execution The Court which passed the decree may send it for execution to another Court in certain circumstances covered by section 39 of the Code. A decree can also be sent for execution in another State. The transferee Court, that is, the Court to which that decree has been sent for execution, shall have the same powers in executing the decree as if it had been passed by itself There are other provisions which provide for execution of a decree in places to which the Code does not extend Section 44-A deals with the execution of decrees passed by Courts in a reciprocating territory Reciprocating territory means,

" any country or territory outside India which the Central Government by notification in the *Official Gazette* declares to be reciprocating territory for the purpose of this section "

Section 44-A provides for the execution in India of the decree of any superior Court of any reciprocating territory. Superior Courts are also defined in the notification referred to It is only decrees of such superior Courts as have been specified in the notification that are executable in the territory of India by reason of this reciprocal arrangement.

By a notification dated 3rd January, 1956, the Federation of Malaya was declared to be a reciprocating territory under section 44-A of the Code The High Court and the Courts of Appeal of the said Federation were also declared to be superior Courts of that territory for the purpose of this section This notification also published a notification issued by the Government of the Federation of Malaya which provided for the execution of decrees of superior Courts in India

1. (1963) 2 M L J 412

in the Courts in the territory of the Federation of Malaya. There seems to be very little doubt that by reason of this notification, the High Court of Penang and the Supreme Court of Malaya are superior Courts within the meaning of section 44-A

It is a well understood principle of law that judgment of a foreign Court cannot operate outside the country in which that Court is situate Such a judgment can however be enforced by action in another territory, the judgment itself operating as the cause of action for the suit. Sections 13 and 14 of the Code of Civil Procedure deal with a suit laid on a foreign judgment Section 13 declares a foreign judgment to be conclusive as to any matter adjudicated upon between the parties thereto, including representatives of those parties Section 14 provides that it shall be presumed on the production of a certified copy of a foreign judgment that such a judgment was pronounced by a Court of competent jurisdiction, but such a presumption is liable to be rebutted The conclusiveness of a foreign judgment adumbrated by section 13 is however subject to certain exceptions set down in that section. While the filing of a suit upon a foreign judgment can be regarded as more or less the normal procedure, it is open to the statute to provide otherwise, and the Code of Civil Procedure has in fact so provided for the direct execution of decrees passed by foreign Courts. By virtue of such provision, a decree passed by any of the superior Courts of a reciprocting territory can be put into execution in this country by filing a certified copy of the decree of the foreign Court, together with a certificate from such superior foreign Court stating the extent to which the decree has been satisfied When an application is made under section 44-A of the Code in the District Court, which is the only Court armed with the powers of the execution of foreign decrees of that nature, the section provides that the decree may be executed in the State as if it had been passed by the District Court The District Court is competent under section 44-A (3) to refuse execution of any such decree if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in section 13

In *Uthamrama* v *Abdul Kassim and Company*[1], a Bench of this Court had to decide two questions in relation to the execution of a foreign judgment in a District Court of this State These questions were (1) whether the non-submission of a certificate from the superior Court at Singapore showing the extent to which the decree is still outstanding will be a bar to the maintainability of the execution petition, and (2) whether the execution petition is barred by limitation Some facts require to be stated in order to understand the scope of that decision The appellant had obtained a decree in the High Court of the colony of Singapore. It was dated the 2nd of October, 1953 By a supplemental judgment dated 25th May, 1954, a partner of the respondent firm was also held liable for the entire amount Various payments had been in partial discharge of the decree and they were all duly acknowledged by the appellant. In October, 1958, one of the partners of the respondent firm was adjudicated insolvent by the High Court of Singapore. That insolvent possessed considerable properties in this country. Some time prior to the adjudication referred to, the appellant filed an application in the District Court of West Thanjavur for executing the decree of the foreign Court. The petition was not accompanied by any certificate from the High Court of Singapore stating the extent to which the judgment remained unsatisfied. The District Judge held that by reason of the bankruptcy of the judgment-debtor, the decree could not be executed in Singapore, the country of its origin, and consequently, it could not be executed here He further held that the application was barred by Article 182 of the Limitation Act. The appellant-decree-holder brought the matter up in appeal to this Court and on the two questions referred to, this Court held that in the absence of a certificate as required by section 44-A, the application for execution could not lie The view taken was that whatever may be the practice obtaining in the High Court of Singapore with regard to certifying part satisfaction of money decrees and the lack of a practice to issue non-satisfaction certificates, an executing Court of this country is bound by the mandatory provisions of section 44-A (2), which

1. (1963) 2 M L J 412.

requires that such a certificate shall be filed along with the certified copy of the decree The learned Judges observed thus (at page 415) :

" The petition under section 44-A of the Civil Procedure Code is an original petition in an Indian Court and unless the terms of the section are satisfied, the petition cannot obviously lie The circumstance that the High Court of Singapore has no practice of recording part satisfaction cannot justify a non-compliance with the mandatory provisions of the section We may, however, observe that even if in that country there is no practice of recording part satisfaction, there could be no prohibition to the decree-holder applying to the Court which passed the decree for a certificate or order that the judgment remains unsatisfied either wholly or with respect to any specified amount We are, therefore, of opinion that the application for execution cannot lie in the absence of the certificate "

So far as this part of the judgment is concerned, the present case does not involve any such defect, for, a certificate of non-satisfaction has been produced by the respondent herein

Dealing next with the question of limitation, the learned Judges pointed out that Article 117 of the Indian Limitation Act provides for a period of six years from the date of the foreign judgment for a suit to be laid thereon. They observe that the general principle is that limitation in regard to suits will be governed by *lex fori* and hold that the rule of limitation applicable for execution of a decree of a foreign Court will have to be found in the Limitation Act They repelled the contention that Article 183 would govern the case According to them, though the foreign Court might have been established by Royal Charter, in so far as the Indian Limitation Act is concerned, in interpreting Article 183, reference to a Court established by Royal Charter can only be to Courts so established in India. Dealing with this aspect of the matter, they state at page 417 :

" It will be noticed that the provisions of the Limitation Act is to govern suits and applications filed in this country Prior to 1937, there was no provision by which decrees passed outside India could be executed by the Indian Courts. Therefore, Articles 182 and 183 can only apply to execution of decrees passed by the Courts of this country and the words " established by Royal Charter " occurring in Article 183 can refer, therefore, only to such Courts established in India and not to any Court albeit established by Royal Charter outside its territory As we have pointed out earlier, the prescribing of different periods of limitation for execution of decrees has no relation to the status or character of the Courts If the Court is one which is specified in Article 183, the period prescribed by that provision will apply for execution of the decrees passed on its Original Side For the reasons stated above, we are of opinion that Article 183 will not apply to execution of a foreign judgment albeit the Court in the reciprocating territory, whose judgment is sought to be executed, might have been established by Royal Charter "

Though the learned Advocate-General, appearing for the respondent decree-holder attempted to argue that the expression " Courts established by Royal Charter" might in the context of the political conditions of India and the colony of Singapore reasonably be interpreted to include the Courts of Singapore as well, we are unable to agree Our view upon this question also accords with the view expressed by the learned Judges in the passage extracted above

The learned Advocate-General contended that the conclusion reached by the learned Judges in the judgment referred to in holding that the period of limitation as prescribed by the Indian Limitation Act for the execution of a decree by the District Court would equally apply to foreign decrees of the kind covered by the reciprocal arrangement requires reconsideration. In order to deal effectively with this contention, it is necessary to set out the reasoning adopted by the learned Judges in this regard. They observe (at page 418) .

"Learned Counsel for the appellant contends that Article 182 will not apply to the present case as the judgment which is now sought to be executed could not be regarded as a decree or order of a civil Court in this country We have earlier referred to section 44-A (1), Civil Procedure Code, which states that where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in the State as if it had been passed by the District Court It would *prima facie* follow, particularly having regard to the fact that the Limitation Act does not provide any special period of limitation for execution of decrees of foreign Courts, that the period of limitation applicable to such cases would be the same as that which would apply for the execution of a decree of the District Court, *viz*, Article 182 But learned Counsel contends that it is only by a fiction that the judgment of the foreign Court is treated as a decree of the District Court for purposes of execution and that fiction cannot be extended so as to attract the provisions of the Limitation Act as well "

After dealing with certain cases which, in the opinion of the learned Judges, did not apply to the case of a foreign judgment, they proceed (at page 419) .

"There is no provision in the Civil Procedure Code or Limitation Act specifically providing for a limitation for execution of the decree of a foreign Court On the other hand, section 44-A itself says that such a decree shall be executed in the State as if it had been passed by the Courts in the State The words of the section are comprehensive enough to treat the decree itself as a decree of a Court in the State and they need not be confined so as merely to confer on the Court the powers which it would exercise in executing its own decree Section 44-A, Civil Procedure Code, creates a fiction that the decree of a superior Court of a reciprocating territory, if filed for the purpose of execution, can be executed as if it had been passed by the Courts in this country The corollary to that fiction is that execution would not lie if in respect of a decree passed by the executing Court the period of limitation as prescribed in this country had expired In giving effect to the legal fiction, a Court is entitled to ascertain the purpose for which the fiction has been created The purpose being one for execution and not merely for the manner of execution, it must follow that all the incidents, including the rule of procedure that applies to execution proceedings, will attach to the decree of the foreign Court"

They then refer to the effect of a legal fiction as indicated in *East End Dwellings Co, Ltd* v *Finsbury Borough Council*[1], and *Income-tax Commissioner* v. *Teja Singh*[2], which lay down that in construing the scope of a legal fiction, it would be proper, and even necessary, to assume all those facts on which alone the fiction could operate They accordingly took the view that it should be assumed for the purposes of section 44-A that the District Court had actually passed the decree, and if so much was assumed, then Article 182 would apply. In that view, the decree was held to be barred by time

The learned Advocate-General argues that the interpretation placed upon the expression " as if it had been passed by the District Court " is not in consonance with the law as laid down in certain decisions His contention is that section 44-A does not say that the foreign decree has to be deemed to be a decree passed by the District Court, but only " as if it had been passed " by the District Court Even assuming either construction, there is still an area of doubt, for there is nothing in the section to indicate the date on which the decree could be regarded to have been passed by the District Court Whether it is the date on which the foreign Court itself passed the decree or whether the date on which the petition was filed in the District Court under section 44-A that should be regarded as the date cannot possibly be elucidated from the section as it is worded But the broader question argued by the learned Advocate-General was, even assuming that the law of limitation is part of the law of procedure, is it proper to interpret the expression "as if it had been passed by the District Court " to lead to this result? Before referring to the decisions cited by the learned Advocate-General, we may remark that a somewhat curious state of things would result if the view is taken that the date on which the foreign Court passed the decree is taken to be the date on which, for purposes of section 44-A, it is treated as having been passed by the District Court. The period of limitations within which proceedings in execution have to be undertaken in respect of a decree, passed by the District Court is three years Suppose the foreign Court which passed the decree is governed by a law of limitation which provides for a much longer period of limitation for the execution of a decree say twelve years, in such an event, the foreign decree-holder would seek to execute the decree in the foreign territory, and failing realisation of the full extent of the decree may obtain a certificate of non-satisfaction in whole or in part, and seek to take advantage of the reciprocal arrangement and try to execute the decree in the Courts in India But, if he comes to India after three years from the date of that decree, according to the decision in *Uthamrama* v *Abdul Kassim & Co*[3], that decree would be a dead decree in so far as its executability in the reciprocating territory is concerned It would mean, therefore, a person armed with a foreign judgment and decree cannot execute the decree in any Court in this country on a date more than three years from the date of the decree itself Examining the question on principle, it seems difficult to conceive that when the two Governments entered into reciprocal arrangements, this result would at all have been anticipated The requirement found in section 44-A (2) appears to us to suggest that before a Court in India proceeds to put a decree into execution, it takes care to see that the decree is executable in the country of its

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1 L.R. (1952) A C 109

2 (1959) S C J. 405 . (1959) 1 M L J (S.C) 154 . (1959) 1 An W R (S C) 154.

3 (1963) 2 M L J. 412.

origin If the decree were no longer capable of execution in the foreign territory itself, the Court which passed that decree would not issue a certificate of non-satisfaction Such a certificate is mandatorily required by section 44-A (2) only to satisfy the executing Court of this country that the decree is still alive and is capable of being executed in the country of its origin If any clue can reasonably be drawn from section 44-A (2), it seems to us that it was only intended to secure that decrees which were no longer alive in the country of their origin were not put into execution in the reciprocating territory

The expression 'as if it had been passed' occurs in more than one section of the Code of Civil Procedure Section 42 enables a Court executing a decree sent to it to have the same powers in executing such decree as if it had been passed by itself This expression again occurs more than once in that very section, the further parts of which state .

"All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree And its order in executing such decree shall be subject to the same rules in respect of appeals as if the decree had been passed by itself"

This expression 'as if it had been passed by itself' occuring in section 44-A cannot have a meaning different from that which it has in section 42. If we examine section 42 then, in the light of the decision in *Uthamrama* v *Abdul Kassim and Co* [1], would it mean that if the decree of a High Court were sent to a District Court for execution, it should be deemed that that decree is one which had been passed by the District Court attracting the lesser period of limitation which the law provides for the execution of a decree of a District Court? Such a construction is hardly possible. The answer may no doubt be that the Limitation Act provides for a specific period for execution of decrees passed by a High Court; but that apart, in interpretating the expression 'as if it had been passed by itself', if the principle laid down in *Uthamrama* v. *Abdul Kasim and Co* [1], were to apply, it would lead to an inconsistent position

With respect, we are unable to agree that the expression 'as if it had been passed' in the context in which it appears in these sections, can be equated to 'deemed to have been passed'.

In *Ramachandra* v *Pichaikanni*[2], the question arose whether when land is sold under the provisions of the Madras Abkari Act, 1864, for arrears due by a Abkari renter, the purchaser takes the land free of all encumbrances as in the case of a sale for arrears of land revenue under the provisions of the Revenue Recovery Act. Section 10 of the Abkari Act enabled the Collector to proceed against Abakari renters licensed under the Act for recovery of arrears due by them in like manner as for the recovery for arrears of land revenue This expression "in like manner as for recovery for arrears of land revenue", in the opinion of the learned Judges, intended only that the same procedure is to be followed, and that section 42 of the Revenue Recovery Act II of 1864, which declared that all land brought to sale on account of arrears of revenue shall be sold free of all encumbrances, could not apply in the case of sales for Abkari arrears In *Chinnaswami Mudali* v. *Thirumalai Pillai and the Secretary of State*[3], a similar expression in the Land Improvement Loans Act XIX of 1883, came to be construed. These observations are pertinent (at page 575) :

"In the present case, it is clear that the Collector when he attached the land and brought it to sale was attempting to recover the loan granted under section 7, clause 1 (*a*) of the Land Improvement Loans Act Clause 1 (*a*) provides that the amount of loan, interest, costs, *etc* shall be recovered from the borrower as if they were arrears of land revenue due by him The question to be decided is therefore whether when the borrower's patta land was sold under the provisions of that clause, the purchaser took it free of all encumbrances as he would do under the provisions of section 42 of Act II of 1864 in case of a sale for arrears of land revenue, or, in other words, has section 42 been extended by section 52 of the same Act to sales for recovery of loans under Act XIX of 1883? The decision in *Ramachandra* v *Pichaikanni* [2] is a clear authority for the negative of the above proposition, unless it can be shown that there is such difference between the wording of section 10 of Act II of 1864 (Madras) and of section 7, clause 1 (*a*) of Act XIX of 1883, as to render this decision inapplicable to the present case . . We cannot see any real difference in recovering arrears as if they were arrears of land revenue and proceeding for the recovery of them in like manner as for the recovery of arrears of land revenue"

1. (1963) 2 M L J 412.
2 I L R 7 Mad 434.
3 (1901) I L R. 25 Mad 572

Both of these decisions accordingly lay down that the expression meant that only the procedure was attracted and not any other incident for which a separate provision existed

A similar view was taken in the case of a sale of certain property under the Revenue Recovery Act for income-tax arrears in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*[1] The question was whether on a sale for arrears of income-tax, the purchaser took the property free of a pre-existing mortgage thereon Under section 30 of the Income-tax Act II of 1886 the Collector was empowered to recover the amount as if it were arrears of land revenue or by any process applicable to recovery of a municipal or local tax The learned Judges observe that section 30 of the Income-tax Act has not the effect of converting income-tax into an arrear of land revenue due in respect of the land, but that its effect simply is to extend the procedure prescribed by Act II of 1864 to the recovery of arrears of income-tax. They approved of the decision in *Ramachandra* v *Pichaikanni*[2].

On a consideration of the entire question we are of the view that where a deeming provision might attract larger incidents, the particular expression in section 44-A (2) is not capable of being given that enlarged construction Our consideration of the question on broad principles also leads us to the view that if such an extended meaning is given to that expression and the decree is deemed to have been passed by the District Court as on the date on which it was passed by the foreign Court, it would render the very reciprocal order wholly infructuous This expression cannot bear a meaning different from that it can bear in other sections of the Code itself, principally section 42.

For the foregoing reasons, we are of opinion that the view expressed in *Uthamrama* v. *Abdul Kassim and Company*[3], requires reconsideration by a larger bench. The matter will accordingly be placed before the Honourable Chief Justice for suitable orders

In pursuance of the abovesaid Order of Reference, the appeal was heard by a Full Bench (*Veeraswami, Kunhamed Kutti* and *Natesan, JJ*).

K. Rajah Ayyar, K. Hariharan and *Habib Mohammed,* for Appellant.

V K Thiruvenkatachari, D. Ramamurthi, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.†—This Civil Miscellaneous Appeal is directed against an order of the learned District Judge of East Thanjavur at Nagapattinam and turns on whether there is any limitation and, if so, what is it for execution by that Court of a foreign judgment of a superior Court in a reciprocating territory The District Judge held that Article 183 of the Limitation Act, 1908, was inapplicable but Article 182 was On the view that the starting point of limitation would be the date of the order of the appellate Court in such territory, he directed execution to proceed. He also repelled a contention that execution was barred under section 13 of the Code of Civil Procedure but this question is no longer reiterated For the appellant-judgment-debtor reliance was placed on *Uthamarama* v *Abdul Kassim and Company*[3], and it was urged that on the principle of this authority, the execution petition should be held to be barred as the judgment of the foreign Court had been obtained on 4th January, 1954 Srinivasan and Ramakrishnan, JJ, who heard the appeal were of the opinion that *Uthamarama* v. *Abdul Kassim and Company*[3], required reconsideration by a larger Bench.

On 4th January, 1954, the respondent obtained a judgment against the appellant in the Consolidated Civil Suits Nos 53 of 1945 and 51 of 1950 on the file of the High Court at Penang for $ 24,682-72 and costs which were taxed at $ 5,453-80. Pending an appeal of the appellant from that judgment to the Supreme Court of Federation of Malaya, the respondent made an application for a direction to the appellant to furnish on or before 30th June, 1954, security for the payment of taxed

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1 (1902) 12 M.L.J 368 : I.L.R. 26 Mad 230
2 I L.R. 7 Mad 434.
3. (1963) 2 M.L.J 412.
† 13th March, 1966

costs and a further security in a sum of $1,000 towards costs of the appeal within the same period which was ordered on 31st May, 1954. This order provided that unless the security was furnished within time, the appeal should be stayed On the respondent's application, again the Supreme Court by an order dated 23rd July, 1954, extended the time upto 31st July, 1954, for compliance But this time the order stated that if the appellant should make default in giving such security by the date fixed, the appeal be dismissed with costs. The appellant defaulted with the consequence that the appeal stood dismissed on 31st July, 1954 The respondent then applied for and obtained from the Supreme Court on 7th December, 1954, a certificate of non-satisfaction of the judgment No execution was levied against the appellant until 3rd December, 1959, when the respondent filed a certified copy of the foreign judgment together with the non-satisfaction certificate and an execution petition in the Court of the District Judge of East Thanjavur for attachment and sale of the appellant's properties On 13th July, 1960, the District Judge ordered attachment from which this appeal has arisen In the meantime, on 19th February, 1960, the respondent applied to the Supreme Court for a formal order striking out the appeal which was given on 23rd February, 1960 When this appeal in the first instance was before Ramachandra Ayyar, C J, and Venkataraman, J, the learned Judges adjourned it on 10th January, 1963, to enable the appellant to have the order of 23rd February, 1960, set aside The appellant's application was disposed of by the Supreme Court on 21st October, 1963, allowing it While doing so, the Supreme Court set aside the earlier order dated 23rd February, 1960, and made it explicitly clear that the order of that Court dated 23rd July, 1954, was the final order and by its operation the appeal stood automatically dismissed on 31st July, 1954.

The District Judge was not prepared to apply Article 183 of the Limitation Act as he was not satisfied that the High Court of Penang had been established by Royal Charter But he took the order of the Supreme Court of Penang dated 23rd February, 1960, as the final order for the purpose of limitation and, applying Article 182 (2) held that the execution petition was not barred by limitation In the appeal, it seems to have been argued before Srinivasan and Ramakrishnan, JJ, as we see from their referring judgment that the conclusion of Ramachandra Ayyar, C J. and Anantanarayanan, J, in *Uthamarama* v *Abdul Kassim and Company*[1] to the effect that the period of limitation as prescribed by the Indian Limitation Act for execution of a decree by the District Court would equally apply to a foreign decree of the kind covered by the reciprocal arrangement required reconsideration. The learned referring Judges indicated their view that the expression "as if it had been passed" in section 44-A of the Code of Civil Procedure could not in the context, be equated to 'deemed to have been passed' which, as they thought, might attract larger incidence and that, if such enlarged construction were given and the decree were deemed to have been passed by the District Court as on the date on which it was passed by the foreign Court, it would render the very reciprocal order wholly infructuous The learned Judges, however, concurred with the view in *Uthamarama* v *Abdul Kassim and Company*[1], in so far as it held that Article 183 was not applicable if the judgment sought to be executed in India was not one rendered by a Court established by Royal Charater in the foreign reciprocating territory. Before us the arguments for the respondent did not proceed precisely on the lines which would appear to have been addressed to the referring Bench

K. Rajah Ayyar who appears for the appellant supports the view taken in *Uthamarama* v *Abdul Kassim and Company*[1], that Article 182 applies. He contends that the words 'as if it had been passed by the District Court' in section 44-A of the Code of Civil Procedure mean that a foreign decree, for the purpose of execution on filing a certified copy thereof in that Court, shall be deemed to have been passed by it on the date the decree originally bears and if it be the case, limitation should be computed from that date or in any case from 3rd January, 1956, when the Govern-

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1. (1963) 2 M.L.J 412

ment of India notified declaring the Federation of Malaya to be a reciprocating territory Learned Counsel argues that though section 44-A does not by itself provide for limiation for execution, it is settled that by operation of International Law, the Indian Limitation Act, as part of procedure, will govern and apply to execution locally of foreign judgment He submits that Article 182 is the proper Article and that if that is not so, Article 181 applied, the starting point for limitation being the date on which the non-satisfaction certificate was obtained by the respondent from the foreign Court whence according to Mr Rajah Ayyar the right to apply for execution accrued On the other hand, Mr V K Thiruvenkatachari for the respondent urges that whatever be the effect of the words 'as if it had been passed' in section 44-A and assuming that the law of limitation, as part of procedure, applies to execution proceedings in the executing Courts in India, there is nothing in section 44-A or its legislative history or any other provision of India law to warrant the view that the Indian Limitation Act will apply to execution of a foreign judgment even before it had been filed in a District Court in India He also contends that, in any case the proper Article which is applicable is Article 183 and that if that be not so, on the same logic neither Article 182 will be applicable so that one is left with Article 181 He would however recognise that to be consistent with the principle of reciprocity, it would be open to a judgment-debtor to show under section 47, Civil Procedure Code, to the executing Court in India that between the date of the non-satisfaction certificate in relation to the foreign judgment and the date of its filing in and execution by that Court, the foreign judgment or decree became barred by limitation in the country of its origin or otherwise stood partly or wholly satisfied or discharged

We take it as incontrovertible under the common law that a foreign judgment or decree does not operate *proprior vigore* in this country and is not capable of automatic execution by the Indian Courts Section 2 of the Code of Civil Procedure defines a foreign judgment as one of a foreign Court which obviously is a Court situate outside the limits of India and has neither been established or continued by the President of the Indian Union nor has authority in India. While a decree of an Indian Court is enforced by proceedings in execution, a foreign judgment, until the enactment of sections 44 and 44-A of the Code, could only be enforced by a suit upon that judgment, subject, however, to the provisions of section 13 of the Code. But the Indian Courts are not bound in every case to take notice of a foreign judgment in a suit to enforce it and it is always open to them to decline to recognise it on grounds of policy Article 117 of the Indian Limitation Act prescribed a period of limitation for institution of a suit to enforce a foreign judgment, namely, six years from the date of such judgment

Before we refer to certain exceptions to the common law rule of inexecutability of foreign judgments by the Indian Court except by an action, introduced in the Code of Civil Procedure in stages, it will be useful to notice the position in the United Kingdom of foreign judgments or decrees The Judgments Extension Act, 1868 was the first in point of time to be enacted by the British Parliament which made certain judgments of the Supreior Courts of Scotland and Ireland effective in the United Kingdom Before that Act, the only way to enforce such judgments in the United Kingdom was by institution of suits on them After the Act, the executability of such judgments in the United Kingdom was permitted on a system of registration with the British Courts by means of a certificate that the particular judgment had been obtained in a Superior Court in Scotland or Ireland The foreign judgment, when so registered, was regarded as extended judgment for purposes of execution but was made subject to certain restrictions Next came the Administration of Justice Act, 1920 which extended the facility of execution in the United Kingdom of foreign judgments to such judgments obtained in a Superior Court in any of the British dominions The judgment-creditor within twleve years of the judgment could apply to the High Court in England or Ireland for registration and the High Court in its discretion could allow or refuse the application. The registration was, therefore, not as of right unlike under the earlier Act of 1868. Further the 1920 Act provided for certain conditions or restrictions for registration

some of which were analogous to those mentioned in section 13 of the Code of Civil Procedure in this country Once a foreign judgment of a Dominion was registered at the British High Court, it was regarded to have the same force as if it had been initially obtained in the registering Court The Act of 1920 allowed registration only if its provisions had been extended by an Order-in-Council to the Dominion in which a Superior Court passed the judgment Registration was thus based on reciprocity. In 1933 the Foreign Judgments (Reciprocal and Enforcement) Act came into force, the effect of which was to extend the provision for registration to foreign judgments of Superior Courts in foreign countries even outside the Dominions. But the extension was to be by Orders-in-Council and on a reciprocal basis Provisions are found in the Act which enable a person, who holds a final and conclusive foreign judgment in his favour of a Superior Court in a reciprocating territory, to apply to the High Court in England for registration within six years of such judgment The High Court was no longer left with the discretion to decline the registration The provision for registration was confined to foreign judgments for recovery of money On certain grounds specified in the Act, liberty was given to the person, against whom the judgment was given, to have the registration set aside. The effect of registration under the Act would appear to be that the foreign judgment registered would, for the purpose of execution, be of the same force and be subject to the same control, as if it had been originally given in the registering Court and that further no action in England would lie on a foreign judgment which was entitled to registration

In British India there was originally no statutory or other provision conferring jurisdiction on Indian Courts to enforce foreign judgments in execution. On 27th February, 1924, a Bill was introduced in the Central Legislature to provide for enforcement in Brithsh India of judgments obtained in the United Kingdom or other notified parts of His Majesty's Dominions, as part of a reciprocal arrangement by which the provisions of Part II of the Administration of Justice Act, 1920 were to be extended to the British India But the Bill was dropped in 1925 on the ground that full reciprocity could not be ensured as most of the British Indian Courts of unlimited civil jurisdiction would not possibly be viewed as Superior Courts as contemplated by the Adminstration of Justice Act, 1920 But the position became different by the passing of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 which provided for the extension of Part I of the Act to His Majesty's Dominions outside the United Kingdom by the Order-in-Council and also left it to the Order-in-Council to specify the Courts which should be deemed as 'superior' within the meaning of the Act The Lord Chancellor having expressed his no objection to the British Act being applied to all Indian Courts possessing unlimited original civil jurisdiction, section 44-A was inserted in the Code of Civil Procedure by section 2 of the Code of the Civil Procedure (Amendment) Act, 1937. The section as then read :

"44-A Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court

Explanation 1 —'Superior Courts', with reference to the United Kingdom, means the High Court in England, the Court of Sessions in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Durham

Explanation 2 —'Reciprocating territory' means any country or territory, situated in any part of His Majesty's Dominions or in India which the Governor-General-in-Council may, from time to time, by notification in the *Gazette of India*, declare to be reciprocating territory for the purposes of this section, and 'superior Courts' with reference to any such territory, means such Courts as may be specified in the said notification"

To the section was added a further '*Explanation*' setting out the meaning and scope of a decree with reference to a superior Court In view of the constitutional changes in 1937, certain consequential amendments were made to the section by the Government of India (Adaptation of Indian Laws) Order, 1937. Later in 1952 by an amending Act of that year, the section was recast and in its present form, it is as follows :

"44-A (1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (*a*) to (*f*) of section 13.

Explanation 1 —' Reciprocating territory ' means any country or territory outside India which the Central Government may, by notification in the *Official Gazettee*, declare to be a reciprocating territory for the purposes of this section , and ' superior Courts' with reference to any such territory, means such Courts as may be specified in the said notification

Explanation 2 —' Decree ' with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment "

Reciprocity within India under that section was, however, not established until 3rd January, 1956, when the Central Government, by a Notification of that date, declared the Federation of Malaya to be a reciprocating territory and the High Court and the Courts of Appeal of that Federation to be the Superior Courts of that territory for the purpose of section 44-A of the Code of Civil Procedure It appears there was in force in the Federation of Malaya what was called the Reciprocal Enforcement of Judgments Ordinance, 1949 enabling the Government of Malaya to extend its provisions to particular foreign territories. On 13th September, 1955, in exercise of his powers under scetion 5 of the Ordinance the High Commissioner for Malaya extended its provisions to judgments obtained in a superior Court in India as it extended to judgments obtained in a Superior Court in the United Kingdom The effect of the enabling provisions and the orders of the relative Governments referred to is that the judgments obtained in the Superior Courts of each of the reciprocating territories became enforceable in the other subject of course to the restrictions conditions and limitations in the *les fori* in the executing territory

Section 44-A of the Code of Civil Procedure read with the Notification made thereunder compendiously but exhaustively provides not only for the executability in India of a foreign judgment in a reciprocating territory but also the procedure to be followed in execution The jurisdiction to execute a foreign judgment is entrusted to a District Court and arises with the filing in such Court of a certified copy of a decree of any of the Superior Courts of the reciprocating territories On such filing the decree of the foreign Court becomes executable in India as if it had been passed by the District Court The term ' district ' in defined in the Code to mean the local limits of the jurisdiction of a principal civil Court of original jurisdiction which is called a ' District Court ' and includes the 'local limits of the Ordinary Original Civil Jurisdiction of a High Court The expression ' foreign Court ' and ' foreign judgment ' are also defined by the Code The former means a Court situate outside India and not established or continued by the authority of the Central Government and ' foreign judgment ' is a judgment of a foreign Court Though section 44-A (1) of the Code speaks of a decree of a foreign Court it may be taken that as it means but the formal expression of an adjudication it includes a judgment of a superior Court of a reciprocating territory in accordance with which no formal decree is drawn up under the procedure applicable to it In fact this is made clear by the second *Explanation* to the section But the judgment should be one so far as the Court entering it which conclusively determines the rights of the parties with regard to all or any of the matters in controversy Further for the purpose of section 44-A a decree or judgment as is seen from the second *Explanation* is not any decree or judgment of a superior Court in the reciprocating territory but is confined to a decree or judgment for money Even then the money payable under the foreign decree or judgment should not be one in respect of taxes or other charges of a like nature or of a fine or other penalty There is also a further restriction namely an arbitration award even though it may be enforceable as a decree or judgment is not enforceable within the purview of section 44-A. Sub-sections (2) and (3) of section 44-A contain the procedure to be adopted in execution of decree

or judgments passed by Courts in a reciprocating territory Sub-section (2) further contains a rule of evidence. Together with the certified copy of a decree should be filed a certificate from the relative superior Court in the reciprocating territory showing the extent to which it has been satisfied or adjusted and such certificate is conclusive proof of the extent of satisfaction or adjustment This only means the executing Court cannot go behind the certificate and embark on an enquiry on the extent of satisfaction or adjustment of the decree as on the date of the certificate. It would impliedly follow that it is open to a party in an executing Court in India to show that the foreign decree or judgment has since been satisfied or adjusted That is a matter relating to execution discharge or satisfaction of the decree or judgment and in fact section 44-A (3) which applies section 47 to execution as from the filing of the certified copy of the decree in a District Court enables that Court to decide such question As we said a foreign judgment has no force except in the country of its origin. As under the Anglo-Saxon Jurisprudence so in this country certain restrictions operate on the recognition and effect to be given to a foreign judgment either in an action based on it or in its execution under the enabling statutory provisions These restrictions are matters of public policy legislative and judicial. Such restrictions are to be found listed by section 13 of the Code of Civil Procedure These restrictions are extended by section 44-A (3) to the execution of a foreign judgment Where such restrictions apply the District Court is perforce to refuse execution of the foreign decree

The rival arguments before us raise the following question (1) Does section 44-A provide not merely for the manner of execution of a foreign judgment but also the period of limitation for it? (2) Is there any period of limitation for filing a certified copy of a foreign judgment and (3) what is the Article of the Limitation Act, 1908 that is applicable to execution of such a judgment? On the first question a two-fold argument in the alternative is addressed to us for the appellant. One is based on the effect to be given to the words 'as if it had been passed by the District Court' in section 44-A (1) The contention is that by those words the foreign judgment shall be deemed for the purpose of section 44-A to be a judgment of the District Court and that as a necessary corollary the period of limitation applicable to execution of its decrees is automatically attracted This view has the support of *Uthamrama* v. *Abdul Kasim & Co* [1] The other part of the argument is that limitation is a part of procedural laws and that since under the International Law, *lex fori* governs execution of a foreign decree or judgment the Limitation Act, 1908 applies to execution. This argument again was accepted in *Uthamrama* v *Abdul Kassim & Co* [1] as an additional reason for the view that execution in that case was barred by time

The words 'as if it had been passed by the District Court' undoubtedly create a fiction whether they are construed in the deeming sense treating the foreign decree for purposes of section 44-A as a decree passed by the District Court or in a sense not having that effect but only indicating a fiction of a lesser scope just enabling the District Court to apply to execution the manner of procedure indicated by section 44-A As to the effect of the words, *Uthamrama* v. *Abdul Kassim & Co.* [1], expressed the view.

> "It would *prima facie* follow particularly having regard to the fact that the Limitation Act does not provide any special period of limitation for execution of decrees of foreign Courts, that the period of limitation applicable to such cases would be the same as that which would apply for execution of a decree of the District Court, namely, Article 182 There is no provision in the Civil Procedure Code or Limitation Act specifically providing for a period of limitation for execution of the decree of a foreign Court On the other hand, section 44-A itself says that such a decree shall be executed in the State as if it had been passed by the Courts in the State The words of the section are comprehensive enough to treat the decree itself as a decree of a Court in the State, and they need not be confined so as merely to confer on the Court the powers which it would exercise in executing its own decree"

The concluding sentence in the above extract shows that the learned Judges in that case considered that in their opinion those words in section 44-A (1) treated as the foreign decree itself as a decree of a Court in India and that means the words automatically, by their own force, attract and apply the Indian Limitation Act,

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1. (1963) 2 M L J. 412 at 418

1908 to execution of a foreign decree just in the same way as in the case of a decree passed by the District Court The Court referred to *East End Dwellings Co , Ltd* v *Finsbury Borough Council*[1] and *Income-tax Commissioner* v *S Teja Singh*[2], which held that if a statute directs an imaginary state of affairs to be taken as real, one should imagine also as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it and not boggle with one's imagination when it comes to the inevitable corollaries of the state of affairs imagined as real Applying this principle, the Court opined that it followed that the Court must assume, for purposes of section 44-A ' that the District Court had actually passed the decree '. Having said that, the learned Judges proceeded at page 419

" If so much is assumed, the question then is only one of interpretation of the provisions of the Limitation Act and Article 182 which refers to execution of decrees by the civil Courts will in our opinion automatically apply That provision will apply to all cases of execution petitions filed under section 44-A, Civil Procedure Code, whether the foreign Court which gave the judgment was a Chartered High Court or any other superior Court In this view it is unnecessary to consider the applicability of Article 181 of the Limitation Act The execution petition in the instant case must therefore be held to be barred by limitation "

Let us examine the facts in that case That was a case of an application under section 44-A to the Court of the District Judge of West Thanjavur for execution of a judgment of the High Court of the Colony of Singapore The judgment was entered on 2nd October, 1953, and there was a supplemental judgment delivered on 25th May, 1954 The judgments were for payment of money and they were partly satisfied One of the judgment-debtors owned considerable properties in this country On 16th August, 1958, sometime prior to his adjudication as an insolvent by the High Court of Singapore, the judgment-creditor filed an application in the District Court, West Thanjavur, for execution by attachment and sale of the debtor's properties in this country The petition was not accompanied by a certificate from the High Court of Singapore showing the extent of non-satisfaction. The District Judge dismissed the application on the ground that the judgment-creditor on account of the adjudication of the debtor in Singapore was not entitled to execute the decree there and so too in this country on that account and that further the application was barred under Article 182 of the Limitation Act On appeal by the creditor, the learned Judges constituting the Division Bench posed two questions for their decision, (1) whether the non-submission of a certificate from the Supreior Court at Singapore showing the extent to which the decree was still outstanding would be a bar to the maintainability of the execution petition and (2) whether the execution petition was barred by limitation They answered both the questions against the appellant-creditor In doing so, they repelled a contention that Article 183 was the Article to apply It is on the view that the words " established by Royal Charter ' in that section can refer only to such Courts established in India and not to any Court albeit established by Royal Charter outside it territory We shall advert to this aspect of the matter when we consider the third question we have formulated for our decision It is obvious from the facts in that case and the view of the learned Judges that the application there was barred by limitation In their judgment, the effect of section 44-A (1) was that the judgment of the High Court, which was entered on 2nd October, 1953 and 25th May, 1954, should be treated as one passed by the District Court of West Thanjavur on those dates and that, therefore, the application for execution filed on 16th August, 1958, more than three years from the date of the judgment was barred under Article 182

With due respect to the learned Judges, we are unable to accept their view as to the scope and effect of section 44-A and the applicability of the period of limitation to execution in India of foreign judgments in exactly the same manner as to execution of a decree passed by the executing Court itself In our view, section 44-A has nothing to do with limitation and is merely confined to an extended application of the procedure provided for the manner of execution of a decree passed by any

1. L R (1952) A C 109.
2. (1959) 1 M L J. (S C) 154 : (1959) 1 An W R (S C.) 154 . (1959) S.C J 425.

civil Court in this country to execution by an Indian District Court of a foreign judgment of a superior Court in a reciprocating territory

When a statutory provision creates a fiction, it is first necessary to find out the purpose for which it was created, in order to understand the scope and implication of the fiction. *State of Travancore-Cochin and others* v *Shanmugha Vilas Cashewnut Factory and others*[1] In that case the Supreme Court quoted with approval the following principles from In re *Coal Economising Gas Company*[2].

> "Where the Legislature provides that something is to be deemed other than it is, we must be careful to see within what bounds and for what purpose it is to be so deemed "

The purpose of the fiction in section 44-A (1) will be clear from an examination of the general sections relating to execution in Part II of the Code of Civil Procedure Section 37 defines a Court which passed a decree. The expression, ' in relation to execution of decree ' means the Court of first instance which, in the exercise of its original jurisdiction, passed the decree and the expression is understood in the same sense even if the decree to be executed has been passed in exercise of appellate jurisdiction The next section says that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution The Court which passed a decree may under section 39 on application send it for execution to another Court if certain conditions specified therein are satisfied The Court which passed the decree may also of its own motion send it for execution to any subordinate Court of competent jurisdiction Section 40 provides for transfer of decrees made by Courts in one State to Courts in another State for execution. Under section 42, the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself Clearly, as it appears to us, the words " as if it had been passed by itself " in section 42 have no more effect than indicating that the executing Court, in executing a decree transferred to it, shall have the same powers of execution as the Court which passed the decree. The words are confined to the manner of execution and do not suggest that they have any implication relating to limitation for execution Similar words occur in section 44 which relates to execution of decrees of Revenue Courts in places to which the Code does not extend The scheme of the sections relating to execution is that a decree is executed either by the Court which passed it or the Court to which it is transferred for execution and in the latter case, the transferee Court will have the same powers of execution as the Court which passed the decree possesses. That is all the meaning of the words " as if it had been passed " in the sections we have referred to But these provisions have no application to execution of foreign judgments. They are not and cannot be transferred to an Indian Court for execution. Nor do the Courts in India exercise the same powers of execution as a foreign Court in the reciprocating territory possesses

The whole purpose of the words " as if it had been passed by the District Court " in section 44-A (1) clearly, in the context of the preceding sections, appears to be to determine or fix the particular District Court in India to execute the foreign decree or judgment and attract to its execution by such Court the manner of procedure that governs execution of its own decree. The purpose and ambit of the fiction go no further In fact, it is impossible to equate the District Court to an original Court in relation to the foreign decree or judgment. The District Court in which a certified copy of the foreign decree has been filed, has no control over that decree itself and all that it can do is to execute it in accordance with its procedural laws and regulations For instance a District Court cannot amend the foreign decree or even hear any argument impugning it Nor, as we already mentioned, can it transfer the certified copy of the foreign decree filed with it to another Court for execution. The District Court will have no power to review the foreign judgment on any ground It may be also visualised that simultaneous execution of the foreign decree in different Courts in different countries constituting reciprocating territories cannot be ruled out

1 (1953) 2 M L J 123 1953 S C J 471 : (1954) S.C R. 53 at 81.

2. (1875) L.R. 1 Ch.D. 182.

Further, we can find no justification in the language of section 44-A (1) for the assumption that the decree should be taken to have been passed by the District Court even on the date it was originally passed by the foreign Court Such an assumption will lead to surprising results and anomalies This very case under consideration will demonstrate it In the light of the facts, it will mean that even before reciprocity was established between the two Governments in January, 1956 and the certified copy of the foreign decree was filed in the District Court in 1959, the District Court had passed the decree The fiction under section 44-A (1) does not, in our opinion, extend to that effect for, unless the laws of this country explicitly so direct, a foreign decree can have no force in this country and that too from a date prior to a date when such laws were made or reciprocity was established thereunder. In England, as we saw, registration of a foreign judgment should be made within a specified period from the original date But there is no such provision to be found in the Code of Civil Procedure. In the absence of such a provision or any indication by any other law in this country, it seems to us not possible to hold that section 44-A (1) has addressed itself to any limitation and provided that the foreign decree, when filed in the District Court, should be taken to have been passed by it on the date it was passed by the original Court

As a matter of fact, the Code of Civil Procedure itself, generally speaking, does not include the law of limitation Referring to the Code of Procedure (Act VIII of 1859) the Right Hon. Sir James Colvile, speaking for the Judicial Committee in *Krishto Kinkur Roy* v *Rajah Burrodacaunt Roy*[1], expressed the view.

"But that Code did not touch the subject of limitation, which continued to be regulated by Act XIV of 1859"

That is still the position under the Code of Civil Procedure, 1908, and the subject of limitation is dealt with separately by the Indian Limitation Act, 1908 In a sense, procedure need not also necessarily include limitation See for instance *Messrs Solar Works* v *Employees' State Insurance Corporation, Madras*[2]. In *Morlays (B'ham) Ltd* v. *Roshanlal*[3], a learned Judge of the Bombay High Court held that the words "as if" were used in section 44-A (1) to make the whole scheme of Order 21 applicable in respect of execution of decrees of foreign Courts and that the words had no wider meaning. This precisely accords with our view.

For the appellant, however, reliance has been placed on certain decisions in support of the contention that the words "as if" also take in limitation In re *Relveders Jute Mills*[4], Rankin, C J, with whom Mitter, J, agreed, held that as section 15 of the Arbitration Act, 1899, directed that an award on being filed in a Court in accordance with the earlier provisions should be enforceable as if it was a decree of that Court, it was not only enforceable as if it were a decree in general but the award having been filed in a partiticular Court should be enforceable as if it were a decree of that Court. That meant that the words employed by section 15 (1) were intended to go to the question of limitation as well as the question of procedure The learned Judges had in mind that contrast between the words employed by section 15 (1) and the words in section 12 of the English Arbitration Act, 1889, namely, an award may by leave of the Court be enforced in the same manner as a judgment or order to the same effect and felt that section 15 (1) of the Indian Arbitration Act, 1899, expressed itself much more widely But the learned Judges themselves referred to section 42 of the Code of Civil Procedure, the language in which was that the Court executing a decree sent to it should have the same powers in executing that decree, as if it had been passed by it and expressed the view that the section merely dealt with the powers of the Court executing it and only with those powers, so that there could not be very much doubt that the question of limitation was excluded from the purview of that section They considered that the question of limitation was not merely a question of power We respectfully agree with this reasoning which, in our opinion, applies to the construction of section 44-A (1) too *Nadirshaw* v *Gajraj*[5], was again a case under section 15 of the Arbitra-

1. 14 M.I A 465 at 486
2. (1964) 2 M L J 223.
3. A.I R. 1961 Bom. 156.
4. A I R 1927 Cal 853
5. A I.R 1942 Bom 34

tion Act, 1899 Beaumont, C J, and Kania, J, were of the view that as the section spoke of an award to be enforceable as if it were a decree of the Court, the expression should be read as including both the manner of execution and the time within which execution should take place. This decision like the Calcutta one does not assist the appellant Apart from what the Calcutta High Court said in regard to section 42 of the Code, neither of these decisions related to a foreign decree or judgment The Code of Civil Procedure is confined to the procedure to be followed by civil Courts in this country in proceedings before them and the Indian Limitation Act applied only to proceedings by suits, appeals or applications in Indian Courts.

It has been argued for the appellant that by the rules of the International Law, when a foreign judgment is executed in a local Court by virtue of enabling provisions, the procedure applicable to the proceedings is the *lex fori* and that procedure includes limitation. The argument to that extent is undoubtedly correct. Dicey's Conflict of Laws (Sixth Edition) at page 859 sets out the rule :

"All matters of procedure are governed wholly by the local or domestic law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs The term 'procedure' is to be taken in its widest sense and includes, *inter alia*, remedies and process, evidence, limitation of an action or other proceeding and set-off or counter-claim "

The author points out where limitation involves substantive rights of the parties, it is excepted from the rule It seems the English lawyers give the widest possible extension to the meaning of the term 'procedure' as including all legal remedies and everything connected with the enforcement of a right, not involving the determination of the nature of the rights We think that the position is the same in this country as well. In *Pierce Leslie* v *Perumal*[1], three learned Judges of this Court including the then Chief Justice held that an application to a British Court in India to send a decree of such Court for execution to a Court of Travancore was neither an execution application nor a step-in-aid of execution within Article 182 (5) of the Limitation Act, 1908 This is on the view that the execution contemplated by the Civil Procedure Code under Article 182 was execution by British Courts in India on application made to such Courts. Oldfield, J, said that the application could not be said to be a step-in-aid, because although it was made to the proper Court, it was not in accordance with the law and that it was not sufficient that it was in accordance with the foreign law administered by the Court where execution proceedings were to be taken. The learned Judge stated the principle to be :

"the law of limitation is a law relating to procedure having reference only to the *lex fori* " and that "no Court is obliged to depart from its own notions of judicial order from mere comity to any foreign nation "

Cheshire in his Private International Law (Sixth Edition) also says that execution of a foreign judgment in a local Court will be governed by the procedure that obtains in the *lex fori* and, therefore, any relevant statute of limitation may be pleaded in defence while a statute of some foreign law, even though it belonged to the proper law of the transaction must be disregarded. The same author further points out at page 686 .

"An English statute of limitation is a good plea to an action brought in England, notwithstanding that the action is still maintainable according to the proper law of the transaction

Thus in *British Linen Company* v *Drummond*[2], the English period of six years was applied to an action on a Scottish contract, although the time within which the action might have been brought in Scotland was forty years the extinction of the right of action by the proper law of the transaction is not a bar to an action in England In other words, if the permissible period is longer in England than in the foreign country the plaintiff is at liberty to sustain his action here Moreover, this is so, even though the foreign Court has already adjudged the action to be barred in its own country."

We, therefore, accept the proposition that by International Law, execution of a foreign judgment is governed by procedure in the *lex fori* and that the law of limitation, where it does not concern the nature of the right, is procedural But we are unable to accept the further proposition that, though a foreign decree may be barred or unenforceable in the country of its origin, it can nevertheless be enforced in the

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1. (1917) 33 M L J 130 I L R. 40 Mad. 1069 at 1081.
2. (1830) 10 B. & C 903.

Indian Court where a larger period of limitation obtains in relation to a similar judgment passed by it To do so will be contrary to the basic requirements of reciprocity Reciprocity in the context means that Indian Courts will execute foreign judgments of Superior Courts in the reciprocating territories in the same manner as if they were their own decree and *vice versa* It follows from the principle of reciprocity that if a foreign judgment is barred by limitation in the country of its origin and is, therefore, unenforceable, it cannot possibly be enforced in the Indian executing Courts on the ground that a larger period of limitation is available there Reciprocity applies to enforceable decrees in the country of their origin. Subject to this, since *lex fori* governs execution, if under the Indian law, the decree is barred, the judgment-debtor can successfully plead it in defence

To sum up our conclusions, we are of the view that section 44-A (1) is confined to the powers and manner of execution and has nothing to do with the law of limitation. The fiction created by the sub-section goes no further and is not for all purposes, but is designed to attract and apply to execution of foreign judgments by the District Court its own powers of execution and the manner of it in relation to its decrees, without reference to limitation It follows that the contrary view expressed in *Uthamrama* v *Abdul Kassim & Co* [1], is, in our opinion, not correct The law of limitation as contained in the Limitation Act, as a procedural law and as *lexi fori*, will, however, apply, independently of section 44-A, to execution in India of a foreign judgment of a superior Court in a reciprocating territory But the effect of its application is a different thing which is a matter of construction and which will be considered elsewhere in this judgment.

We now pass on to a consideration of the second question From our earlier observations it should be clear that the fiction in section 44-A (1) does not, in any way, affect the original date of the foreign judgment when filed in a District Court in India There is no indication in the section that the date of the foreign judgment should be taken to be anything but the original date But can it be said that the Indian Limitation Act applies to it even from that date? Neither section 44-A nor the International law relating to foreign judgments and their execution in the local Courts provides an answer. But there can be only one answer, as we think, namely, that it does not The jurisdiction of a District Court in this country to execute a foreign judgment arises from and is exercisable by the filing of a certified copy of the foreign decree or judgment It is only thereafter, and never until then, the procedural laws as *lex fori* will be attracted to execution The Indian Limitation Act can possibly apply to such execution only after filing a certified copy of the foreign decree or judgment as required by section 44-A (1) It is argued for the appellant that since sub-section (2) of section 44-A requires a non-satisfaction certificate from the foreign superior Court to be filed together with a certified copy of the decree of such Court, compliance with that requisite is a condition precedent to invoking the jurisdiction of the District Court for execution of the foreign decree or judgment and that, therefore, the right to apply for execution arises the moment the foreign Court issues a non-satisfaction certificate We are unable to accept this contention on two grounds The first is what we just now referred to, that before the filing under section 44-A (1), the Indian Courts will have no jurisdiction to execute the foreign judgments and before that event, therefore, there is no possibility of the application of the Limitation Act to foreign judgments The second is that sub-section (1) of section 44-A does not require the filing of a non-satisfaction certificate as a condition for the District Court to assume jurisdiction Sub-section (2) of the section does not pertain to jurisdiction but is in our view procedural; it contains besides a rule of evidence as to the conclusiveness of the certificate in the specified respect We are, with respect, unable to agree with *Uthamrama* v *Abdul Kassim & Co* [1], which held that unless a non-satisfaction certificate is filed together with a certified copy of the foreign decree, the mere filing of a certified copy of the foreign judgment or decree alone will not vest the District Court with jurisdiction to execute.

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1. (1963) 2 M.L.J. 412.

It is next to be considered whether there is any limitation for filing a certified copy of a foreign decree or judgment under section 44-A (1) Though such filing is like registration under the English procedure, there is no provision in India, unlike in the United Kingdom, which specifies any period of time within which the filing should be done Further, filing is not an application and is not even a step-in-aid of execution It is but a ministerial act which in terms of the statutory provision gives rise to the jurisdiction of the District Court concerned and makes it competent to apply its powers of execution according to the law applicable to such Court to the execution of a foreign decree or judgment The Limitation Act applies only to suits, appeals and applications In *Hansraj Gupta* v *Official Liquidators of Dehra Dun etc Company*[1], the Judicial Committee of the Privy Council held

> " Unless the application which the Liquidators made on the 26th March, 1928, was a 'suit instituted' or 'an application made', for which a period of limitation is prescribed by the First Schedule, no question of limitation in regard thereto can arise "

There is no such provision in the First Schedule to the Limitation Act treating the filing under section 44-A (1) as an application and providing limitation therefor. An application normally contains a prayer for some kind of an order or relief of interlocutory character or sometimes even a final order Filing under section 44-A (1) by itself will not enable the Court to execute, for it contains no prayer in that regard The party, who seeks execution of a foreign judgment, has after filing a certified copy thereof to apply under Order 21, rule 11 of the Code of Civil Procedure for execution and it is only then the executing Court can proceed *Ebrahim Kassam* v *Northern Indian Oil Industries Ltd* [2], held that filing of an award by an arbitrator was a ministerial act and not a judicial or quasi-judicial act of the arbitrator Mukherji, J , in that case followed an earlier judgment of the Calcutta High Court in *Anandi Lal* v *Keshavdeo*[3] On that view Article 178 of the Limitation Act will have no application for filing of an award by an arbitrator under section 14 (1) of the Arbitration Act, 1940 That was the decision by a Divisional Bench of this Court in *Dasaratha Rao* v *Ramaswamy Iyengar*[4], where Govinda Menon and Basheer Ahmed Sayeed, JJ , observed :

> " All provisions of limitation are intended to prescribe a period for taking steps by a party who has perforce to have recourse to a Court of law for getting relief The arbitrator is not in that position His situation is analogous to that of an adjudicator resembling a Court and unless the provisions of the Limitation Act expressly provide a period of limitation for any act to be performed by him, it is unreasonable to impute any intention to the Legislature, that an article of the Limitation Act should control his actions That Article 178 is applicable only to parties and not to arbitrators has been decided already by other High Courts "

Though this reasoning may not precisely apply to the filing under section 44-A (1) and the analogy between section 14 (1) of the Arbitration Act and section 44-A (1) of the Code is not close, broadly speaking, the filing for the purpose of section 44-A (1) is not a judicial act as an application for which a period of limitation is provided but is a ministerial act which the statute requires to be done so that the District Court may be seized of jurisdiction to execute a foreign judgment There is also another reason why we must hold that there is no period of limitation for filing a certified copy of a foreign judgment The procedural laws in respect of the executing Court are applicable to execution of foreign judgments only on and from the date of the filing under section 44-A (1) and it follows that in the absence of a specific provision in the Limitation Act, no question of limitation will arise for filing Further, as we already mentioned, filing will not, by itself, give the right of execution, for it will be open to the judgment-debtor under section 44-A (3) to prove that the foreign decree is inexecutable in the country of its origin This liberty is also inherent, as we are inclined to think in the very concept of reciprocity for purposes of execution We are of the view, therefore, that no question of limitation arises before or for filing under section 44-A (1) of the Code

That takes us to the last question as to what the proper Article applicable to execution in India of foreign judgments is On this matter, we are in complete

1 I L R 54 All 1087 at 1074 . L.R. 60 I A 13 64 M L J 403
2. A.I R. 1951 Cal. 230.
3 I L R (1945) 2 Cal. 526 : A I R. 1949 Cal 549
4. (1955) 2 M.L J. 693 at 696.

agreement with the reasoning and conclusion in *Uthamrama* v *Abdul Kassim & Co* [1], that Article 183 will be inapplicable. We do not, therefore, propose to reiterate the reasoning and cover the same ground. We may, however, briefly state that the difference in the period of limitation applicable for execution of a decree on the Original Side of Courts established by Royal Charter and decrees of other Courts in this country, which were eventually merged in the High Court under the High Courts Act, 1861 sprang out of historical reasons and had nothing to do with the status of the Courts as those established by Royal Charter or not. This was pointed out by the Judicial Committee in *Kristo Kinkur Roy* v *Rajah Burrodacaunt Roy*[2]. After quoting two extracts therefrom, the learned Judges in *Uthamrama* v. *Abdul Kassim & Co* [1] went on to say at page 417 .

"From the observations extracted above it follows that the mere fact that a Court has been established by a Royal Charter does not *ipso facto* attract the operation of section 19 of the 1859 Act which corresponds to the present Article 183 On the other hand, that Article would apply to decrees obtained on the Original Side alone of the High Courts of the three Presidency Towns Act IV of 1859 was superseded by Act IX of 1871 Article 169 of the latter enactment which corresponded to section 19 of the old Act accepted the view of the Privy Council and expressly referred to decrees as 'those in the exercise of their Ordinary Original Civil Jurisdiction'. This Article 169 was renumbered as Article 180 in the Limitation Act of 1877 and the same has been reproduced in the present Limitation Act of 1908 as Article 183 It will be noticed that the provisions of the Limitation Act is to govern only suits and applications filed in this country Prior to 1937 there was no provision by which decrees passed outside India could be executed by the Indian Courts Therefore Articles 182 and 183 can only apply to execution of decrees passed by the Courts of this country, and the words 'established by Royal Charter' occurring in Article 183 can refer, therefore, only to such Courts established in India and not to any Court albeit established by Royal Charter outside its territory "

We are in entire agreement with these observations which represent, in our opinion, a correct statement of the law We are, however, not able to agree that Article 182 is applicable If Article 183 is applicable only to execution of decrees of a Court established by Royal Charter in this country, which, as we think, is correct, on the same logic and reasoning it should, in our view, be held that Article 182 is not applicable either to execution of foreign judgments because that article also is confined to execution of a decree or order of any civil Court in this country Mr. V. K Tiruvenkatachari pressed before us that the language in Article 183 should be liberally and widely read so that it comprehends decrees of superior Courts in the reciprocating territory. But the reasoning on this aspect in *Uthamrama* v. *Abdul Kassim & Co* [1], which commends itself to us, provides an effective answer against the contention

We are thus left with Article 181 which is a residuary article We are of opinion that this article is the only one that applies to execution of a foreign judgment under section 44-A of the Code The language in column 1 for this article is not related to any particular Court The article prescribes a period of three years and the limitation commences when the right to apply accrues The right to apply under Order 21, rule 11 of the Code of Civil Procedure for execution of a foreign judgment accrues on and from the date of filing under section 44-A (1) and for this purpose non-filing of a non-satisfaction certificate is not relevant

The appeal is dismissed with costs.

V S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT .—MR. JUSTICE P S KAILASAM

K Sadasiva Reddiar .. *Petitioner**

v

R Duraiswamy Reddiar and others .. *Respondents*

Madras Co-operative Societies Act (LIII of 1961), sections 20, 26, 27, 28 and Rule 30 of the Co-operative Societies Rules, 1963—Scope of—Bye-laws of a registered society—Contravention of—Effect on proceedings

It is no doubt true that under section 26 of the Madras Co-operative Societies Act, the ultimate authority of a registered society vests in the General Body of its members But while the Act makes

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1 (1963) 2 M L J 412

2 (1872) 14 M I A 465 at 486

* W P No 3128 of 1965 and C M P No 14721 of 1965. 9th February, 1966.

an express provision for expulsion of a member if he acts adversely to the interest of the society, it does not provide for removal of a member of a Committee constituted under the Act Section 28 relates only to disqualification for membership of a Committee

The bye-laws of a registered society may provide for election or removal of the President or members of a Committee Such bye-laws, subject to the provisions of the Act and Rules, have to be followed in holding meetings and conducting proceedings Where the bye-laws of a registered society stipulate that at least three days' notice should be given in cases of meetings specially convened and the notice should specify the subject to be brought before the meeting, failure to follow the bye-law will invalidate the meeting

Where the bye-law of a society provides that the General Body shall have power to remove the President it is not open to the Committee of the society to remove the President by a resolution Equally the function of the casting lots to decide who among the directors are to retire by rotation is vested in a Committee specifically under section 27 (3) of the Act and such powers cannot be exercised by the General Body

The fact that an appeal is provided to the Registrar under section 73 of the Act is no bar to the exercise of jurisdiction by the High Court under Article 226 of the Constitution of India when there has been flagrant violation of the provisions of the Act

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *quo warranto* to the first respondent calling on him to show under what legal authority he is acting as President of the Valaieduppu Multi-purpose Co-operative Credit Society, Musiri Taluk, Tiruchirapalli district and petition for leave to file additional grounds

K. Narayanaswami Mudaliar, for Petitioner

N R Chandran for *N Srivatsamani*, for 1st Respondent

K S Bakthavatsalu, for the Additional Government Pleader, for Respondents Nos 2 and 3.

The Court made the following

ORDER.—This petition is for grant of a writ, direction or order, as may be necessary in the circumstances of the case, particularly a writ in the nature of *quo warranto* to the first respondent calling upon him to show under what legal authority he is acting as President of the Valaieduppu Multi-purpose Co-operative Credit Society

The facts necessary for the disposal of the petition may be stated The petitioner was one of the Executive Committee members elected under section 27 of the Madras Co-operative Societies Act, 1961 Under the bye-laws, he was also elected President of the Committee for the management of the society There were some misunderstandings between the members of the Executive Committe, and on 9th June, 1965, a few members of the Committee expressed dissatisfaction of the management of the society by the President The Extension Officer (Co-operation) Thathiengarpet conducted an enquiry into the affairs of the society He issued notice to the petitioner, but he refused to acknowledge the receipt of the same On 22nd June, 1965, the third respondent, as Enquiry Officer issued a notice calling for the meeting of the Panchayat at 2 P M on 25th June, 1965 No agenda or particulars of business were mentioned in this notice. It was requested that the Panchayatdars may be present at the meeting This notice was issued on 22nd June, 1965 by registered post and it was acknowledged by the petitioner on 28th June, 1965. While so, the meeting as directed was held at 2 P.M on 25th June, 1965. Four members were present and the petitioner was absent As the petitioner was absent, a new Minutes Book was opened and the proceedings of the previous meeting dated 9th June, 1965 were recorded and the meeting was adjourned On the same day, the four panchayatdars gave a requisition to the third respondent to elect a new President The third respondent issued notices fixing the meeting at 5 P M on the same day to consider the action to be taken in the circumstances, and to elect a new President It is stated that an attempt was made to serve the petitioner for the adjourned meeting at 5 P.M. but as he was not available, it was served on him by affixture in his house.

At the meeting at 5 P.M. the Panchayat passed a resolution removing the petitioner from the office of the President and elected the first respondent herein as the President and authorised him to convene a meeting for deciding who was to retire in rotation and for electing new members. The Panchayat again met at 5-30 P.M. and passed a resolution to the effect that a general body meeting be convened at 3 P.M. on 28th June, 1965 for determining as to which of the two members should retire by drawing lots. Timings for calling for nominations, withdrawals and election if necessary and declaration of the result were fixed. The general body meeting was held at 3 P.M. on 28th June, 1965, and lots were drawn in that meeting. The petitioner and one Ramaswami Reddiar were declared retired by rotation. As there were only two nominations for the two vacancies, they were declared elected. Subsequently, a meeting of the new Panchayat was held, and the first respondent was elected as the President.

The petitioner submits that there is no provision in the Act for removal of the President, that the meeting convened was without notice to him and illegal and that, in any event the convening of the meeting at 5 P.M. on 25th June, 1965 without notice to him and the passing of the resolution removing him from the office of the President and appointing the first respondent as President cannot be sustained in law. The petitioner also submits that the retirement of two members at the general body meeting on 28th June, 1965 is opposed to the requirement of the Act, whereby the retirement can only be effected by the Committee. It is further urged that the Board is in error in declaring the petitioner retired and electing two new members to the two vacancies. The subsequent election of the first respondent is also questioned as the Panchayat was not properly constituted.

Under section 26 of the Madras Co-operative Societies Act, 1961, the ultimate authority of a registered society vests in the general body of its members. The general body of the society elects a Committee in accordance with the bye-laws and entrusted the management of the affairs of the society to such Committee. The term of office of an elected member of the Committee constituted under the Act is 3 years. It is provided that one-third of the members elected to the Committee at the first election shall retire at the end of the first year after such election and as nearly as may be, another one-third of the members elected as aforesaid shall retire at the end of the second year after such election, the members so to retire at the end of the first and second years aforesaid being determined by lot by the Committee. Section 28 mentions the disqualifications which would make a person ineligible for being elected or appointed as a member of the Committee. Section 28 (2) provides that a member of the Committee shall cease to hold office on the happening of certain contingencies. While the Act provides that a member of the registered society who had acted adversely to the interests of the society may be expelled by a resolution of the general body passed at a special meeting convened for the purpose by votes of not less than two-thirds of the total number of the persons present, it does not provide for removal of a member of the Committee constituted under the Act. The Act does not provide for the election of a President, or for removal of the President, or members of the Committee. But bye-law 20 of the society empowers the general body to remove anyone of the Panchayat members by a resolution. Bye-law 25 provides that no notice is necessary for an ordinary meeting, but if it is a meeting specially convened, three days notice should be given mentioning the subjects that are brought in the meeting. The provisions relating to the removal of the members, as well as the President, make it clear that it can be done only by a general body meeting. Section 27 also provides that two of the members will retire at the end of the first year by casting of lot by the Committee. It is not in dispute that the meeting for which the third respondent gave notice on 22nd June, 1965 did not mention any particular subject. If a resolution was intended to be passed removing the President or appointing any person as the President, even according to the bye-laws, 3 days' notice specifying the subject to be brought before the meeting is necessary. Notice by the third respondent dated 22nd June, 1965 does not comply with this requirement. It is stated that a Panchayat meeting was held at 2 P.M. and after recording the proceedings of the previous meeting, it was adjourned. As the petitioner was absent, on a requisi-

tion by the four members, another meeting was convened for the purpose of election of a new President The third respondent in his affidavit does not state that the meeting was for the purpose of removal of the present petitioner from his Presidentship This meeting was convened without notice to the petitioner. The petitioner was admittedly absent at 2 P M, and no notice was served on him. It is stated that as the petitioner was absent notice was served by affixture at his door As already stated, the meeting for the purpose of removal of the President is a special meeting and 3 days' notice is required according to the bye-laws At this stage, it may also be stated that the notice issued by the third respondent on 22nd June, 1965 was received by the petitioner only on 28th June, 1965 and the petitioner pleads that he had no information about the meetings at 5 P M and at 5-30 P M on 25th June, 1965. The two meetings were held with unseemly hurry without notice to the petitioner and the petitioner was removed The way in which the meeting was conducted was extraordinary and obviously intended to pass the resolutions in the absence of and without notice to the petitioner. Apart from the illegalities in the service of notice and the convening of the meetings, it has to be noted that the bye-laws empower only the general body to remove the President. The resolution removing the President from his office is therefore beyond the powers of the Committee.

The retirement of two members, one of them being the petitioner, is also challenged as not in accordance with law Section 27 (3) of the Act provides that every year one-third of the members shall retire by casting of lot by the Committee This function is that of the Committee and in this case it is admitted that the lots were drawn by the general body The powers that are specifically granted to the Committee cannot be exercised by the general body The contention of the learned Counsel for the respondent that as all the powers of a registered society are vested in the general body they can also retire members by casting lots, is opposed to the specific provision in section 27 (3) Rule 30 of the Madras Co-operative Societies Rules, 1963, provides that the election shall be held at a general meeting of the society specially convened for the purpose of which not less than 7 days' notice shall be given to the members Admittedly in this case only 3 days' notice was given The meeting convened is therefore not in accordance with law and the election of the two Committee members cannot be held valid The subsequent election of the President by this illegally elected Committee cannot also be sustained On the facts, therefore, the meeting held at 5 P M, on 25th June, 1965 the removal of the petitioner from the office of President, the election of the first respondent as the new President, the subsequent general body meeting on the 28th, the retirement of two members, including the petitioner, and the subsequent election of two new members are all wholly opposed to law and unsustainable.

The learned Counsel for the respondent sought to contend that this Court should not interfere even if the meetings were improperly convened and the petitioner was improperly removed and a new President appointed, as the petitioner had a right to take the dispute to the Registrar under section 73 of the Act This may be so But the existence of an alternative remedy will not prevent this Court from interfering with such flagrant violations of the provisions of the Act The learned Counsel for the respondent submitted that if there was any irregularity in the convening of the meetings, it was only a breach of the provisions of the bye-laws and it cannot be agitated in writ proceedings As already observed, there is not only contravention of the bye-laws, but also of the provisions of the statute.

In the result, the meeting held at 5 P M on 25th June, 1965 and the resolutions removing the petitioner from the post of President and electing the first respondent as the President and the retirement of two members including the petitioner at the meeting held on the 28th and the subsequent election of two new members, and the first respondent as the President are set aside This writ petition is ordered accordingly No order as to costs

R.M. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P S KAILASAM

P B K Raja Chidambaram .. *Petitioner**

v.

The Tiruchirapalli District Co-operative Central Bank, Ltd, by its Secretary *Respondent.*

Madras Co-operative Societies Act (LIII of 1961) *and Madras Co-operative Societies Rules,* 1963 *rule* 31 (2)—*Election of President and Vice-President if could be done only after all the members of the Committee have been elected*

It is no doubt true that in the ordinary course of events the election of members of the Committee would precede the election of the President or the Vice-President of a Co-operative Society, for the President and the Vice-President are elected only from among the members that are elected But there may be cases in which for some unforeseen reason election of one or two members of the Committee could not take place. It does not mean that in such cases no election of the President could be held unless all the members are elected.

A reading of rule 31 of the Co-operative Societies Rules relating to election of President and Vice-President of a Co-operative Society does not justify the contention that no election of the President could be held unless all the members are elected Such election could be held even if one or two members are yet to be elected In the absence of the President and the Vice-President the Secretary of a Co-operative Society can convene a meeting

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent to forbear from holding the Special Meeting (as the Secretary of the respondent calls) on 13th March, 1966 at 3 P M in pursuance of the notice No 15/65-66, dated 5th March, 1966

T R. Srinivasan, for Petitioner.

The Court made the following

ORDER.—This petition is filed for the issue of a writ of *mandamus* directing the Tiruchirapalli District Co-operative Central Bank, Ltd, represented by its Secretary to forbear from holding the special meeting for the election of the President and the Vice-President for the bank at 3 P M on 13th March, 1966 The petitioner was a Director and Vice-President of the bank having been elected for three years from 1st January, 1965 But he retired on 31st December, 1965, because according to the Rules one-third of the directors had to retire by rotation For filling up the vacancy caused by the petitioner's retirement, elections were to be held by the Lalgudi Co-operative Supervising Union, Ltd, wherefrom the petitioner was returned Dates for the nomination, scrutiny, time for withdrawal and the election were fixed The petitioner also filed the nomination for election to the Directorate of the Tiruchirapalli Co-operative Central Bank from the Lalgudi Co-operative Supervising Union The petitioner's nomination was rejected on the ground that the petitioner had seconded the nomination of another candidate The petitioner challenged the validity of the rejection of his nomination by a writ petition In the writ petition it was held that the rejection of the petitioner's nomination paper was erroneous and the order rejecting his nomination was quashed

Along with the petitioner, the President of the bank also retired by rotation The election of the President and the Vice-President is to take place The President and the Vice-President will have to be elected by the Directors Two-thirds of the Directors that were elected in the year 1965 continued to function as directors and with regard to one-third of the directors, who retired by rotation, elections were conducted to all the seats except two, one of which being the representative from the Lalgudi Co-operative Supervising Union After the disposal of the writ petition declaring that the rejection of the nomination of the petitioner by the Scrutiny Committee of the Lalgudi Co-operative Supervising Union was erroneous the Secretary of the Bank called for a meeting of the Directors of the bank by notice

*W.P. No. 575 of 1966. 10th March, 1966.

dated 5th March, 1966 for the 13th instant at 3 P M The petitioner prays that the Court may issue a writ of *mandamus* directing the Secretary of the Tiruchirapalli District Co-operative Central Bank, Ltd, not to hold the special meeting on the ground that, since the election of the two Directors have not yet taken place, the President and Vice-President cannot be validly elected Learned Counsel submitted that the election of a Director from the Lalgudi Co-operative Supervising Union ought to be held earlier than the President's election for that would give an opportunity to the petitioner to contest the Presidentship or the Vice-Presidentship According to the learned Counsel, the petitioner has been illegally deprived of his right to contest for the two posts He also pointed out that the petitioner had been Vice-President of the bank up till his retirement by rotation and that he has a fair chance of being re-elected Apart from the merits of the case, learned Counsel submitted that in law the election of the President and the Vice-President cannot be held now, as it is contrary to rule 31 of the Madras Co-operative Societies Rules, 1963 He also submitted that the Secretary is not the competent authority to call for a meeting for election of the President and the Vice-President according to the Rules. Rule 31 (2) provides that as soon as the members of the Committee have been elected, the President of the Society shall arrange to convene a meeting of the Committee for the purpose of the election of the officers Learned Counsel would submit that this rule can only be understood to mean that the election of the President of the society can only take place after the members of the Committee have been elected and that the only authority that can arrange for the meeting is the President of the Society No doubt, in the ordinary course of events the election of the members of the Committee would precede the election of the President or the Vice-President, for the President and Vice-President are elected only from the members that are elected But there may be cases in which for some unforeseen reason, election of one or two members of the Committee could not take place . A reading of the Rules does not justify the contention that no election of the President could be held before all the members are elected There could be no objection to holding a meeting for the election of the President and the Vice-President, even though one or two members are yet to be elected The contention of the learned Counsel that it is only the President of the Society that can arrange to convene a meeting for the election of the President and the Vice-President cannot be accepted In this case, the President and the Vice-President have retired by rotation and some authority will have to convene a meeting There is nothing in the Rules in support of the contention that in the absence of the President, it is only the Registrar that can arrange to convene a meeting I am unable to accept any of the contentions put forward by the learned Counsel

The writ petition is dismissed

R M ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR M ANANTANARAYANAN, *Officiating Chief Justice*

Ponnuswamy Padayachi and others .. *Petitioners**

v

Nallamuthu Padayachi and others . *Respondents*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 101—Order under—Requisites of—Persons claiming to be in possession of property in their own right—If could be dispossessed under the summary provisions

Section 101 of the Madras Hindu Religious and Charitable Endowments Act, 1959 (corresponding to section 87 (2) of the earlier Act) is a summary procedure whereby a person appointed as trustee can summarily obtain possession of the properties of religious institution from an obstructor, on the certificate issued by the Commissioner The implementation of this certificate is provided for by a virtual process of execution through a Magistrate of requisite jurisdiction.

It is no doubt true that generally speaking a Magistrate giving effect to a certificate under the section is in the position of an executing Court and could not go behind the certificate issued by the Commissioner He has no jurisdiction to question the legality or correctness of the certificate.

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* Crl R C No 925 of 1965 (Crl R P No 913 of 1965). 25th March, 1966.

But this proposition is not absolute and in certain circumstances a Magistrate whose aid is sought can refuse to give effect to a certificate under the section if he finds it suffers from a basic defect which prevents its implementation, such as the absence of the name of the person against whom it is issued.

The Commissioner or Deputy Commissioner who issues a certificate under the section should not only find that the property in question belongs to the religious endowment concerned but should also find that the person from whom delivery is sought comes within the terms of the section If there is no such finding the order is null and void and is not capable of implementation by a Magistrate.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate (Judicial), Ariyalur, dated 28th May, 1965 and made in C.M.P. No. 118 of 1965.

R. Sundaralingam, for Petitioner.

K Raman, for Respondents.

The Public Prosecutor, for State.

The Court made the following

ORDER.—This Criminal Revision Case involves a question of interest, upon the degree to which a Magistrate can proceed into the basis of a certificate by a Deputy Commissioner in the prescribed form under section 101 of Madras Act XXII of 1959, setting forth the finding that the property in question belonged to the concerned religious institution, and directing delivery thereof to a petitioning party, by the party in possession Incidentally, the entire question involves a clarification of certain basic principles of law, which do not appear to have been directly adverted to, in the few precedents that have been cited at the Bar.

Admittedly, section 101 is a kind of summary procedure, whereby a person appointed as trustee, or to discharge functions of that character, can summarily obtain possession of the alleged properties of the religious institution, from an obstructor, on the basis of a certificate issued by the Commissioner The implementation of this certificate is also provided for in the section, and the concerned trustee may apply to any Presidency Magistrate or Magistrate of the First Class of requisite jurisdiction, virtually to execute the certificate by directing delivery Upon the nature of this proceeding, there have been certain decisions of this Court, and it may be convenient to refer to them immediately before going further.

In *Shanmugham Archagar* v *Munuswami*[1], Ramaswami, J , had to deal with section 87 (3) of the earlier Act XIX of 1951, which is by concession a parallel provision of the prior enactment After referring to several precedents, the learned Judge observed that the Magistrate giving effect to the certificate was in the position of an executing Court, and could not go behind the order or certificate issued by the Commissioner He has no power to entertain any objection to the validity, legality or correctness of the order The only remedy of the aggrieved party is to file a suit, as specifically provided for by means of the last proviso to section 87. In that particular case the learned Judge held that a plea to the effect that the temple was a private temple could not be raised or entertained before the Magistrate. after the Commissioner had issued the certificate

In *Chidambaram Chettiar*, In re[2] the learned Judge again observed that proceedings for delivery under section 87 were in the nature of execution proceedings, and that the executing Court, here the Magistrate, had no jurisdiction to question the correctness, legality or propriety of the decree

In *Rathinasamy Moopanar* v *Subramania Udayar*[3] Kunhamed Kutti, J. referred to the provisions of section 101 and following *Shanmugha Archagar* v *Munuswami*[1] pointed out that the Magistrate executing the certificate or implementing it in an application under section 101 for delivery was in the position of an executing Court.

1. (1959) 1 M.L J 144
2. (1958) 1 M.L J 314.
3. (1964) 1 M.L J 244.

He cannot entertain any objection to the validity, legality or correctness of the order.

In *Abboyi* v *Suranna*[1], a learned Judge of the Andhra Pradesh High Court has made certain observations on the same lines, and laid it down that a certificate issued by the Commissioner was of the nature of a decree for possession, and that the Magistrate is bound by this Ramakrishnan, J , appears to have followed this line of reasoning in a recent case[2] which has not been reported so far.

In *Subbarayalu Mudaliar* v *Nachimuthu*[3], Kailasam, J , pointed out that if there was a person claiming possession of the temple, or properties in his own right, independently of any trusteeship, he will be excluded from the purview of the section on the very language used But a person who is entitled to administer as a trustee and is liable as such, will be bound by section 101

But, though the general situation at law may thus be regarded as well settled, it clearly needs the addition of a refinement in one important respect Even the dictum that the executing Court cannot go behind the decree that it is asked to execute, is neither without exception nor absolute I think it is sufficient to refer, in this context, to the Full Bench decision in *Mohan Ram* v *Sundararamier*[4], to which I was a party The Full Bench held that the power of an executing Court to go behind the decree, because it is opposed to public policy or it offends a statutory prohibition, is upon another plane altogether The Court can go behind the decree in such an instance

A very brief reference to the facts of the present case, will be necessary to elucidate the particular principle that is in issue As will be seen from a glance at section 101, it is not every person who may be in possession of the properties of a religious endowment, against whom a proceeding can be taken under this provision of law On the contrary, the provision is explicitly restricted to a person in possession who is a trustee, office-holder or servant of the religious institution, or one who has been dismissed or suspended from such office, or any person claiming or deriving title from such trustee, office-holder or servant This is a positive limitation. Not merely this There is also a negative limitation, in that a person who could claim in good faith to be in possession on his own account, or on account of some person not being such a trustee, office-holder or servant, is definitely excluded. It is clearly not enough that there is a finding that the property belongs to the religious endowment in question The Commissioner, or Deputy Commissioner, must find that the person from whom delivery is sought comes within the terms of section 101 If there is no such finding, the order is null and void, in the sense that it lacks one essential decision or finding that alone makes it capable of implementation before a Magistrate It will be like a decree that deals with property situate in another country, or which deals with some property or right in a manner that is prohibited by law, and thus goes to the root of the jurisdiction of the Court which passed the decree. As I noted earlier, the principle that an executing Court cannot go behind the decree will hold good in most instances; but it will not hold good where the decree *ex facie* cannot be executed by the Court, and is opposed to law, or so defective as to be incapable of implementation

Apart from the Full Bench decision that I have already referred to, we have the decision of Ramaswami Goundar, J , in *Subbu Chetti* v *Munuswamy Chetty*[5], which has not been dissented from, to my knowledge, and which rightly lays down, if I may say so with respect, that the person in possession must be found by the Commissioner to be a person against whom an order can be made under section 101. Otherwise, treating the certificate as a decree, it will be void because even, on the face of it, it is essentially defective in the sense that it does not find that the party against whom it purports to be made comes within the scope of section 101 of the Act. It is indisputable, I think, for instance, that an order under section 101 cannot

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1 (1962) 2 An W R 140 (1962) M L J (Crl) 408.

2 Crl R.C No. 1776 of 1964, Crl R P No. 1747 of 1964

3 (1965) 1 M L J 359 (1965) M L J. (Crl) 199

4 (1960) 2 M L J 30 (F.B.)

5. (1957) 2 M L J 161.

be made against a trespasser, who claims to have perfected title to, the property in his possession against the religious institution, by adverse possession

On the facts of the present case, it is clear enough that the respondents claim to be in possession of these lands in their own right, quite independently of the temple, denying that they were lessees of the temple as alleged, and further claiming that their right to the lands was based upon ancestral enjoyment in the context of a different private temple, though the deity thereof was the same deity as regards nomenclature (Mariamman) The Deputy Commissioner has found, on the evidence, that the present properties are lands of the suit religious institution So far, his finding must be respected, and the Magistrate cannot go behind it, however, erroneous the Magistrate may think it to be But the Deputy Commissioner has not found, and I can discover not a trace of such a conclusion in the annexure to his order, that the respondents, or any of them, fall within any category of persons against whom an order could be obtained under section 101. He has not even applied his mind to this aspect, when the respondents explicitly claimed that, in good faith, they were entitled to possession of the properties independently of the religious institution and adversely to it In other words, this is practically tantamount to a decree in which there is a basic defect which prevents its implementation, such as absence of the name of the party against whom the decree is passed Further, the defect is not in the certificate, but in the judgment or order giving reasons, so that the defect cannot be cured by any mere verbal amendment

Under these circumstances, I think that the learned Magistrate was perfectly correct in coming to the conclusion, which is virtually what he has done, that he could not implement the certificate and that he had necessarily to dismiss the application under section 101 The revision proceeding is dismissed, of course it is perfectly open to the revision petitioner to apply again to the Commissioner for a certificate under section 101, when, no doubt, the respondents will make their appearance, and the entire question will be gone into, on the merits, whether the respondents fall within any of the categories of persons described in section 101 against whom a valid order for delivery could be made No order as to costs

R.M. — *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR M ANANTANARAYANAN, *Officiating Chief Justice*

Manickammal .. *Petitioner**

Madras Prohibition Act (X of 1937), sections 7 (d) and 10 (a)—Offence under—Person present in a house during a search when prohibited liquor was found—If could be presumed to be in possession of the liquor.

The mere fact that a person is a member of a household or that such person was present in the house when prohibited liquor was seized from the house by the police, cannot by itself lead to any inference that such person was in possession or had knowledge of possession of the contraband It is equally impossible to assume that the person was in joint possession, as the possession might have been on the part of one or the other members of the household and the person charged may be quite innocent

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sixth Presidency Magistrate, Saidapet, Madras, dated 23rd June, 1965 and passed in C C No 11159 of 1964

R Swaminathan, for Petitioner.

The Public Prosecutor, for State.

The Court made the following

ORDER —I think that this revision will have to be clearly allowed, because the facts of the record, taking them as fully established, do not warrant the inference

* Crl. R C No 1010 of 1965 (Crl R P No. 995 of 1965). 24th June, 1966.

that the revision petitioner is guilty under section 7 (*d*) read with section 10 (*a*) of the Madras Prohibition Act read with G.O. Ms No. 3031, Home, dated 1st November, 1958.

We may take it that there was a raid by the Police in the house of Chellammal, the daughter of the revision petitioner, on the occasion in question, and that the Police recovered two gunny bags (M Os 1 and 2) containing bottles of Tincture Zingeberis Mitis There were a large number of bottles, and another khaki bag contained eight 3 oz bottles with Tincture Zingeberis Mitis Indisputably, if the revision petitioner possessed these bottles, consciously or with knowledge, she would be liable to be punished under the provisions of law above set forth

But this is precisely what is not warranted by the bare facts of the record There is not even evidence that the revision petitioner is a permanent resident of this particular house, but I shall assume it But, even so, her daughter and son-in-law are residing there, and it is very probable that the son-in-law, who is a male member of the household, had stored these bottles in the gunny bags It may be that the revision petitioner had also knowledge of the concealment of this contraband, but the mere fact of her physical presence at the time of search, proves nothing whatever The daughter and son-in-law would appear to have been charge-sheeted, but they were acquitted, and their cases do not concern me. On the bare facts that (1) a person is a member of the household, and (2) that person was present when the contraband was seized by the Police, it is impossible to base any inference that that person had exclusive possession, and knowledge of possession of the contraband It is further impossible to assume that, that person was in joint possession, as the possession might have been on the part of one of the other members of the household, and the person may be quite innocent I give the benefit of these doubts to the revision petitioner, and direct her acquittal. The fine amount of Rs 200, if paid, will be refunded to her.

R M ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS·

PRESENT .—MR JUSTICE P. RAMAKRISHNAN.

Ramanujam .. *Petitioner**

v.

Forest Range Officer, Padugai Range .. *Respondent.*

Madras Court-fees and Suits Valuation Act (*XIV of* 1955), *Schedule II—Articles* 3 (1) *and* 11 (*g*)—*Criminal appeal by accused—Court-fee payable on appeal memo*

In the Criminal Procedure Code there is no distinction between an 'order' and 'judgment' as in the Civil Procedure Code and in an appeal against an order of conviction it is irrelevant to make a distinction whether it is an appeal against a judgment or order The scope of Article 3 (1) of Schedule II of the Madras Court-fees and Suits Valuation Act, 1955, is made wider (as compared with the corresponding provisions of Article 11 (*a*) of Schedule II of the earlier Act) and is made applicable to all Courts civil and criminal and would apply to all criminal appeals The word ' order ' in the article in the context of a Criminal appeal, should be taken to include a judgment leading to an order of conviction or acquittal

(Scope of Article 11 (*g*) of the present Act corresponding to Article 11 (*b*) of the earlier Act explained) Distinction between 'Judgment ' and ' order ' explained

Kuppuswami Rao v. *The King*, (1947) F C R 180 (1947) F L J 110 (1948) 1 M L J 103, referred to

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the District Magistrate (*J*), Tiruchirappalli, dated 18th August, 1965, and made in C A No 212 of 1965 (C C No 1899 of 1965, Sub-Magistrate's Court, Jayakondan)

A K Sreeraman, for Petitioner

S T Ramalingam, for the Government Pleader on notice from Court.

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* Crl R C No 1625 of 1965 28th June, 1966
(Crl R P No 1599 of 1965).

S R Srinivasan, for the Public Prosecutor for State

The Court made the following

ORDER —This revision case raises a short but interesting question on the interpretation of the law of Court-fee The question that arose before the learned District Magistrate, from whose decision the present revision case is filed, is whether a memorandum of appeal presented by the accused in a criminal case, against his conviction and sentence, should be affixed with a Court-fee label of one rupee under Article 3 (1) of Schedule II of the Madras Court-fees and Suits Valuation Act, 1955, or seventy-five paise under Article 11 (*g*) of Schedule II of the Act These two articles are extracted below ·

"3. (1) Memorandum of Appeal from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure, 1908, and not otherwise provided for when presented to any Court other than the High Court or to any Executive Officer, other than the Board of Revenue or Chief Executive Authority . . *One rupee*"

11. "(*g*) Application or petition presented to any Court, or to any Magistrate in his executive capacity and not otherwise provided for in this Act . . *Twelve annas*"

In the view of the learned District Magistrate the former provision applied, whereas the accused, who is the petitioner before me, contends that it is the latter provision that will apply. Against the decision of the District Magistrate, the accused has filed the present revision

In the Schedule to the Court-fees Act, 1870, before the amendment by the Madras Court-fees and Suits Valuation Act, 1955, there were two provisions which may be referred to Article 1 (*b*) of Schedule II stated that an application or petition when presented to a civil, criminal or revenue Court or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector or to any Magistrate in his executive capacity, and not otherwise provided for by this Act, in the case of criminal complaint, should be affixed with a Court-fee stamp of one rupee, and in other cases with Court-fee stamp of twelve annas Article 11 (*a*) of the former Act provided for a Court-fee of one rupee in the case of a memorandum of appeal when the appeal is from an order inclusive of an order determining any question under section 47 or section 144 of the Code of Civil Procedure, 1908 and is presented to any civil Court other than a High Court or to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority This latter provision in the old Court-fees Act, 1870, restricted the levy of one rupee Court-fee on a memorandum of appeal to cases where it is presented to a civil Court or a Revenue Court or Executive Officer, etc But in the new Act when dealing with a memorandum of appeal in Article 3 (1) the above restriction is left out, and the words 'any Court' is substituted. The provision of Court-fee of twelve annas in the case of application or petition found in Article 1 (*b*) of Schedule II of the old Act is repeated in Article 11 (*g*) of the new Act Because of this wider scope given in Article 3 (1) of the new Act to a memorandum of appeal after deleting the restriction to particular Court mentioned in Article 11 (*a*) of the old Act, that the well-known commentators of the Court-fees Act, Krishnamurthi and Mathrubutham, in the 1955 Edition of the Guide to the Law of Court-fees at page 209, observed that in the case of appeals commenced before 19th May, 1955, Article 11 of Schedule II of the old Act would not apply, but they should be charged a Court-fee of twelve annas under Article 1 of Schedule II of the old Act But after 19th May, 1955, when the new Act came into force, the language of Article 3 of Schedule II would apply to appeals, filed in Criminal Courts also.

Learned Counsel for the petitioner referred to the fact that Article 3 (1) of Schedule II of the new Act refers to a Memorandum of Appeal from an 'order,' and in his view, an order in a criminal case would not include a judgment of conviction or acquittal. According to the learned Counsel, the Criminal Procedure

Code uses the words 'order' and 'judgment' in distinct contexts, that one cannot be mistaken for the other, that since Article 3 (1) is silent about a judgment, it should not be held to apply to an appeal from a judgment, and that a memorandum of appeal from a judgment should be stamped with a Court-fee appropriate to an application or petition as provided in Article 11 (*g*) As against this contention, the learned Government Pleader as well as the learned Public Prosecutor stress that the Criminal Procedure Code uses the words 'order' and 'judgment' in a common footing, in several provisions It is also pointed out that the Criminal Procedure Code does not define what a judgment means unlike the Civil Procedure Code, which defines a 'judgment' in section 2, as a statement given by the Judge of the grounds of a decree or order Section 404 of the Criminal Procedure Code provides that no appeal shall lie from any 'judgment' or 'order' of a criminal Court except as provided for by that Code or by any other law for the time being in force Section 419 of the Criminal Procedure Code states that every appeal shall be made in the form of a petition in writing presented by the appellant, or his Pleader, and every such petition shall be accompanied by a copy of the 'judgment' or 'order' appealed against Section 367 (6) of the Criminal Procedure Code states that for the purposes of this section an order under section 118 or section 123, sub-section (3) shall be deemed to be a judgment The learned Public Prosecutor referred me to a decision of the Federal Court in *Kuppuswami Rao* v *The King*[1], where certain useful observations in this connection are found The question that arose before the Federal Court was with reference to the scope of section 205 of the Government of India Act, 1935, which provided for an appeal to the Federal Court from any judgment or decree or final order of a High Court While referring to the fact that the Civil Procedure Code has defined 'judgment' for civil suits, the Federal Court observed that in India, in the Criminal Procedure Code, though the word 'judgment' is not defined that term is used to indicate the termination of a case by an order of conviction or acquittal It is therefore reasonable to assume that in the context of an appeal from a conviction as in this case, it is irrelevant to make a distinction as to whether it is against a judgment or an order From one point of view it can be looked at as against a judgment in so far as it terminates the case, by an order of conviction. From the operative part of the judgment, namely, the conviction (or acquittal) it can be described as an appeal against the order of conviction (or the order of acquittal) It is therefore reasonable to hold that, when in the amended Court-fees Act the scope of appeal for the purpose of Court-fees was widened and made applicable generallly to all Courts, civil and criminal, the Legislature did not specifically refer to judgments, but contented themselves with the word 'order', bearing in mind that the word 'order' in the context of a criminal appeal, will include a judgment leading to an order of conviction or acquittal I am therefore of the opinion that the view of the lower Court that a Court-fee of one rupee has to be paid on the memorandum of appeal is correct and calls for no interference by way of revision The revision case is therefore dismissed.

R M. *Revision case dismissed.*

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1. (1948) 1 M L J 103 · 1947 F C R 180 · 1947 F L J. 110.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR M ANANTANARAYANAN, *Chief Justice*, AND MR JUSTICE P. RAMAKRISHNAN

Mohammed Habibullah and another .. *Appellants**

v

K Seethammal .. *Respondent*

Motor Vehicles Act (IV of 1939), sections 110 to 110-F—If self-contained code—If controlled by the provisions of the Fatal Accidents Act (XIII of 1855)

It is true that a claim for compensation for death could be made under the Fatal Accidents Act only by a limited class of heirs or representatives of the deceased But sections 110 to 110-F of the Motor Vehicles Act is a self-contained Code providing for compensation and the machinery of adjudication in cases of motor accident The provision in the Act has no connection with the Fatal Accidents Act and it cannot be contended that a claim under the Motor Vehicles Act should be governed by the provisions of the Fatal Accidents Act Section 110-A of the Motor Vehicles Act provides for the foundation of a claim by any legal representative of the victim of an accident Hence a married sister of a bachelor who died as a result of an accident by a motor vehicle, could file a claim for compensation under the Act

The driver of the vehicle concerned in an accident is not always a necessary party to a claim under the Act and it cannot be said that the non-joinder of the driver will vitiate the proceedings

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr Justice Venkatadri, dated 11th November, 1965, and made in C M A No 313 of 1963 preferred to the High Court against the order of the Motor Accidents Claims Tribunal, Madras, dated 15th December, 1962 and made in M A C T No 14 of 1962

Sivaswami of *Sundararajan* and *Sivaswami*, for Appellants.

The Judgment of the Court was delivered by

Anantanarayanan, C J—We are fully satisfied, after a careful consideration of the arguments urged by the learned Counsel for the appellants, that this Letters Patent Appeal ought not to be admitted The facts are clear The appeal is sought to be filed by the owner of a motor vehicle and by the Insurance Company, with regard to a case of a fatal motor accident, which gave rise to a justifiable claim for compensation. Not merely the Claims Tribunal constituted under the Motor Vehicles Act, which went into the question, but also the learned Judge (Venkatadri, J ,) who heard the Civil Miscellaneous Appeal, both came to the unambiguous conclusion on the merits that this was a case of a motor accident that ended fatally, under such circumstances as to justify, and fully justify, the claim for compensation

The main argument pressed before us was that the claimant was the married sister of the victim, a bachelor who died without leaving a child, parents or any other heir Our attention was then drawn to the provisions of the Fatal Accidents Act (XIII of 1855), under section 1-A of which an action of that kind should be brought forward by an " executor, administrator or representative of the person deceased " There are authorities of High Courts, into which we need not proceed here, since this proposition is not really relevant for our purpose, that the word " representative " in section 1-A, does not mean a legal representative of the kind contemplated in the Civil Procedure Code, but must have reference to the earlier words in the same section, " for the benefit of the wife, husband, parent and child " There is much to be said for the view that, if this Central Act XIII of 1855 is to govern the claim, a married sister of the victim, who died a bachelor without leaving behind a wife, child or parents cannot bring forward a claim of this sort for her own benefit

But the law has not been stationary since that Central Act was enacted in 1855. On the contrary, there has been considerable development since then, and it is also obvious that, in the subsequent century that has elapsed, the volume of motor traffic

*L P A No 49 of 1966. 4th July, 1966.

and the statistics of motor accidents, fatal or otherwise, must both have originated and increased beyond all proportions In this perspective, the Legislature has deliberately enacted the Motor Vehicles Act, and provided by virtue of sections 110 to 110-F of that Act, not merely a self-contained code for the adjudication of claims to compensation on behalf of the victims of a motor accident, but also a complete machinery for the adjudication of such instances Under section 110-F, the jurisdiction of the civil Court is specifically ousted by the Claims Tribunal for the area The claim in the present case is under sections 110 to 110-F of the Motor Vehicles Act. It has no connection whatever with the Indian Fatal Accidents Act (XIII of 1855) and is not advanced under any section or provision of that Act It is noteworthy that sections 110 to 110-F that we have referred to, make no mention of any kind concerning any of the provisions of the Fatal Accidents Act, and do not incorporate any such provision even by the most oblique reference.

Notwithstanding all this, and notwithstanding the fact, which is undeniable, that under section 110-A of the Motor Vehicles Act, an application for compensation arising out of an accident can be put forward " by the legal representatives of the deceased ", the ground is urged that the Fatal Accidents Act (XIII of 1855) ousts the relevant provisions of the Motor Vehicles Act We are unable to accept this argument, and it is not related to the structure of either Act On the contrary, the relevant part of the Motor Vehicles Act is free of any reference, even obliquely, to the Fatal Accidents Act An argument is further advanced that the Motor Vehicles Act (sections 110 to 110-F) does not lay down any new liability, it only provides for machinery for the adjudication of claims to compensation Certain observations of the Punjab High Court in *Sri Ram Pratap* v *Punjab Roadways, Ambala*[1], are relied upon, in support We have looked into this decision, and we do not find there any reference to the provisions of the Fatal Accidents Act, as excluding the application of the Motor Vehicles Act It is true that the learned Judge states that sections 110 to 110-F of the Motor Vehicles Act do not supersede the cardinal principles of liability in tort But that observation was made, in the context of a situation when it had to be considered whether it was necessary or not necessary to establish, in support of a claim for compensation under the Motor Vehicles Act, that the accident was the result of negligence on the part of the owner or driver of the vehicle In the present case, we have already affirmed that, on the merits, both the Claims Tribunal and the learned Judge found that this was an accident which could give rise to a claim for compensation under the law The only point was whether the claim could be advanced by the married sister of the deceased, who died a bachelor It can certainly be so advanced, since section 110-A definitely provides for the foundation of a claim by any legal representative of the victim of the accident

We have also been invited to consider the argument that the non-joinder of the driver of the vehicle, as a party to the proceedings, will vitiate the proceedings We can find nothing in the record, or in the provisions of the Act, to justify this view In our view this is a simple case of a claim to compensation arising out of a fatal motor accident, preferred by the immediate next-of-kin and legal representative of the victim, under the provisions of the Motor Vehicles Act, which was justly recognised by the Courts Neither the owner of the vehicle, nor the Insurance company, can be said to have suffered any prejudice, or to have sustained any ground of grievance. The Letters Patent Appeal is dismissed

R M *Appeal dismissed*

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1. A I R. 1962 Punj. 540.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE M. NATESAN.

The State of Madras, represented by the Special Tahsildar, for L. A. Municipal Cases, Madurai .. *Appellant**

v.

Mohammad Sirajudeen .. *Respondent.*

Limitation Act (IX of 1908), section 12 (2)—Computation of time under—Batch of appeals against common judgment—Certified copies of judgment filed in one appeal and dispensed with in other appeals—Later certified copies out of time—If the other appeals could be in time on the basis of the judgment filed originally in one of the appeals.

Section 12 (2) of the Limitation Act is explicit and clearly prescribes that in computing the period of limitation for purposes of appeal the day on which the judgment complained of was pronounced and the time requisite for obtaining certified copy of the decree should be excluded. In other words for purposes of limitation both the time factors will enter into computation.

Where under the rules the production of a copy of the judgment is dispensed with in a batch of appeals still the date of the judgment and the time requisite for obtaining a copy of the decree should be the basis of the computation of limitation with reference to each of the appeals. The time for preferring an appeal should be calculated on the endorsements on the copies of judgment produced in each of the appeals, even if they are filed in a batch and in one of them such copies are produced and in the rest their production is dispensed with. The delay may however be excused in such cases in the liberal exercise of the discretion of the Court.

Appeal sought to be preferred to the High Court against the Decree of the Court of the First Additional Subordinate Judge, Madurai, in Original Petition No. 114 of 1964.

The Government Pleader, for Appellant.

The Order of the Court was made by

Veeraswami, J.—The State filed a batch of appeals against different respondents but certified copies of a common judgment were produced only in one of the appeals and their production in each of the rest of the appeals in the batch was, by an order of this Court, dispensed with. On the basis of the certified copies of the decrees filed in the appeals in which the production of the printed common judgment was dispensed with, those appeals are found to be out of time.

Learned Government Pleader argues that the endorsements on the printed copies of the common judgment produced in one of the appeals should be made use of in calculating time for filing appeals under section 12 (2) of the Limitation Act. We do not think that learned Government Pleader is right in his contention. Section 12 (2) of the Limitation Act is explicit and clearly prescribes that in computing the period of limitation, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree should be excluded. In other words, for the purpose of limitation both the time factors will enter into the computation. Where under the rules the production of a copy of the judgment is dispensed with still the date of the judgment and the time requisite for obtaining a copy of the decree should be the basis for such computation. Merely because the production of a certified copy of the judgment is dispensed with it does not follow from it that we can disregard the date on which the judgment was obtained and time for limitation computed with reference to the endorsements to be found on a printed copy of the judgment produced in another appeal.

That was the view of a Division Bench of this Court in *Avudai Ammal* v. *Ganapathi*[1]. There it was held :

"An appellant is not entitled to a deduction of the time taken in obtaining copies of judgment to be filed in another connected appeal."

This view was followed by Kailasam, J. in C.M.P. Nos. 296 to 310 of 1966. The time for preferring an appeal should therefore be calculated on the endorsements on the judgments produced in each of the appeals, even where they are filed in a batch and in one of them such copies are produced and in the rest their production

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*Appeal No. of 1966 S.R. No. 54693 of 1965. 6th July, 1966.

1. A.I.R. 1915 Mad. 493.

is dispensed with Where, of course, there are petitions to excuse delay in filing appeals, in such cases, as was pointed out by the Division Bench of this Court just referred to, discretion of this Court in excusing the delay may liberally be exercised, in the particular circumstances

Our attention is invited to *Mt Bibi Umtul Rasul* v *Ram Charan*[1] There two learned Judges of the Patna High Court were inclined to the view that in cases like this, time requisite for obtaining a copy of the judgment would be excluded under section 12 (3) in computing the period of limitation in respect of all the appeals filed by the appellant although only one copy of the judgment is filed for all the appeals. But we find from the judgment that the practice of the Patna High Court has been that only one certified copy of the judgment in the case of batch of appeals need be filed That in our opinion makes a difference In any case, as we said, we share the view in *Avudai Ammal* v *Ganapathi*[2]. The result is the appellant will have to file petitions for excusing the delay.

R M. —— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(In Insolvency)

PRESENT —MR. JUSTICE K S RAMAMURTI.

Seth Gokaldas Lalchand by agent Ramchand S Pahlajani, and another . *Applicants**

v

V S Krishnamurti . *Respondent*

Presidency Towns Insolvency Act (III of 1909), section 9 (g)—Act of insolvency under—Notice of suspension of payment of debts—If should be for all the creditors

Before a notice given by a debtor could be construed to be an act of insolvency within the meaning of section 9 (*g*) of the Presidency Towns Insolvency Act, it should be established that the notice expresses a general intention to stop payment to every creditor and the suspension of payment is of the entirety of the debt. The notice of suspension of payment must be in respect of the whole of the indebtedness

Where the intimation of suspension of payment is in relation only to a particular creditor or class of creditors (like Multani Bankers), but does not relate to all the creditors collectively it is insufficient to constitute an act of insolvency within the meaning of section 9 (*g*) of the Act. It may be that the notice of suspension may be sent either to all the creditors or to a body of creditors but what is important is the suspension of payment of debts should be in relation to all the creditors

Application (1) for adjudicating the debtor herein as insolvent; (2) for directing the estate and effects of the said debtor to vest in the Official Assignee of Madras ; (3) for directing the taxed costs of this petition to be paid to the petitioning creditors-applicants by the Official Assignee of Madras from and out of the estate of the debtor abovenamed ; and (4) for other orders and Application (1) for appointing the Official Assignee as Interim Receiver of the estate and effects of the debtor wherever situate with powers to take possession of the account books and all the building materials and building machinery belonging to the debtor and kept by him at plot No 86, Jayamangalam, Ramakrishna Nagar, Madras-28, and at other place or places including the premises No 49/2, Royapettah High Road, Madras-4, pending disposal of the main petition , and (2) for other orders

D. B Jagannadha Rao, for the Debtor

C Vasudevan, for Petitioning Creditor.

N Kotiswara Rao, Official Assignee in person

The Court delivered the following

JUDGMENT —This petition has been filed by the petitioning creditors to adjudge the debtor, V S Krishnamurthi, an insolvent on the ground that he had committed an act of insolvency within the meaning of section 9 (*g*) of the Presidency Towns

1 A I R 1920 Pat 535 2 A I R 1915 Mad 493 (2)

*Petition No 20 of 1966. 11th July, 1966.

Applications Nos. 135 and 136 of 1966.

Insolvency Act, and in support of their case the petitioning creditors relied upon the oral evidence of P W 1, the Multhani broker who arranged for the loans, as well as the letter Exhibit P-2 passed by the debtor to P W 1

Mr Jagannatha Rao, learned Counsel for the debtor raised two points (i) that the letter Exhibit P-2 does not amount to giving notice by the debtor of his intention to suspend payment of his debts within the meaning of section 9 (*g*); (ii) and that, in any event, any such intention as revealed or disclosed in Exhibit P-2 is not suspension of payment of the entirety of the debts, *i e*, debts due to all the creditors in a collective body, but only the debts to the tune of Rs 85,000 referred to in Exhibit P-2 due by the debtor to the Multhani bankers for whom P W 1 acted. as broker When P W 1 was examined with reference to the circumstances under which the debtor gave this letter, he stated that notice of suspension of payment was only with reference to the Multhani bankers from whom he (P W 1) had arranged for loans to the debtor and that it did not relate to all the debts of the debtor P W 1 also admitted that the reference to " the calling of the meeting of the creditors " as also the " request for getting some time from the creditors ", was only to the Muthani bankers to whom a sum of Rs 85,000 was due I put several questions to P W 1 and it is clear from his answers that at the interview which took place between him and the debtor both of them were concerned only with the debts due to the Multhani bankers a particular section of the creditors of the debtor and that the interview had nothing to do with the entire body of creditors of the debtor The position, therefore, is that, even assuming that Exhibit P-2 is construed as amounting to a notice of suspension of payment within the meaning of section 9 (*g*) it is not an intimation of suspension of payment of all the debts of the debtor, but only some of his debts

My attention was drawn to a Bench decision of the Calcutta High Court in *Indo-Burmah Trader's Bank* v *Barada Charan*[1], (a case arising under the analogous provision under the Provincial Insolvency Act—section 6 (*g*)) in which it was held that to bring the case within clause (*g*) of section 6, the notice of suspension must be for the whole of the indebtedness and that it must amount to an expression of a general intention to stop payment to every creditor In that case the notice was given to two creditors, and the Bench took the view that in the absence of proof that there were no other creditors, it could not be held that the expression of intention was to suspend payment to every creditor.

I may also refer to the statement of law in Mulla's Law of Insolvency, Second Edition, page 132, where the learned author states the law in these terms:

> " A notice of suspension of payment of debts may be oral or in writing, but must be a notice deliberately given and must amount to an intimation to the creditors that the debtor intends to suspend payment of his debts due to *all* his creditors, but mere intimation of inability to pay his debts does not ordinarily amount to such notice, though taken with other circumstances it may so amount The notice must be such that the creditors may be led naturally to infer that the debtor intends to suspend payment of his debts "

Reference may also be made to a Bench decision of the Lahore High Court in *Harkishan Lal* v *Peoples Bank of Northern India*[2], where Jai Lal, J delivering the judgment of the Bench after reviewing the entire case-law summarised the position in the above terms It is significant to note that of the words " to suspend the payment of his debts due to *all* his creditors ", the word *all* has been italicised in the said decision

I may also refer to the Bench decision of the Patna High Court in *Lakhi Prasad* v. *Ugrah Misra*[3], where the Bench has laid down the principles for determining whether the debtor's statement satisfies that requirement of law One of the conditions pointed out by the Bench is that the intimation of suspension of a payment should not only be in relation to a particular creditor, but it should be in respect of debts due to all the creditors collectively

This was followed in the later Bench decision of the same Court in *Hardayan Dass* v. *Jagarnath Marwari*[4], in which the evidence was that the debtor's statement of

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1. A I R 1944 Cal. 370.
2. I.L R 14 Lah 117 at 127.
3. A I R 1933 Pat 461
4. A.I R 1934 Pat. 526

suspension of payment was in relation to some particular creditors, and it was held that was insufficient in law and that the suspension of payment must be with regard to all the creditors as one body

I am satisfied that having regard to the scheme of the Insolvency Act, the suspension of payment must be the suspension of payment of the debts due to all the creditors It may be that the notice of such suspension may be either to all the creditors or to a body of creditors But what is most important is that notice of suspension of payment should be suspension of payment of debts due to all the creditors This aspect of the matter is also emphasised in the leading decision of the House of Lords in *Clough* v *Samuel*[1] Vide the following observations of Lord Robertson at page 448

> " A man faced by a balance-sheet which means certain and speedy ruin may try to arrange *with his more pressing creditors*, or he may put off the evil day and stagger on, leaving the stoppage of his career to be brought about by the action of others Either of those courses is different from suspending payment of his debts "

I may also refer to the evidence of P W 1, that apart from the Multhani creditors for whom he acted as broker, he did not know the other creditors of the debtor I have no doubt whatsoever in my mind that when the debtor passed the letter Exhibit P-2, he wanted to gain some time from the Multhani Bankers (a section of his creditors) and he never had in his mind the general body of his creditors, as a collective unit

For all these reasons, I hold that his letter Exhibi P-2 does not amount to an act of bankruptcy within the meaning of section 9 (*g*) of the Act The petition is, therefore, dismissed

The Official Assignee who has been appointed Interim Receiver, shall be discharged forthwith The debtor shall take possession of the properties in the custody of the Official Assignee and also the key on payment of the expenses which the Official Assignee has incurred in keeping watch over the properties

No costs.

R.M. ——— *Order accordingly*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE M NATESAN.

Krishnamurthi Ayyar .. *Petitioner**

v

Govindaswami Pillai and another .. *Respondents.*

Madras Panchayats Act (XXXV of 1958), section 25 (2) (a)—Rules for Decision of Election Disputes Relating to Panchayats, Rule 6—Election petition challenging election of respondent as a member of Panchayat on the ground that he was suffering from leprosy—Election Court if can order compulsory medical examination of the respondent—Refusal to submit to such examination—Presumption

Civil Procedure Code (V of 1908), section 151—Scope—Compulsory medical examination of a party against his wish—Power of civil Courts to order under

In an election petition challenging the election of the respondent as a member of a Panchayat on the ground that he was suffering from leprosy and was thus disqualified under section 25 (2) (*a*) of the Panchayats Act, the election Court, cannot, at the instance of the petitioner, compel the respondent to appear before a medical officer and to submit himself for a medical examination for the purpose of ascertaining the fact whether he was suffering from leprosy Such an order will not be justified under the inherent powers of a civil Court under section 151 of the Civil Procedure Code. To start with, the election Court is not a Court as is generally understood Its powers are circumscribed by its constitution Secondly, assuming it may have inherent powers in procedure, the exercise of any inherent power must be consistent with sound general principles of law and cannot override the rights of parties It is the birth right of a man to claim that there shall be no trespass to his person unless provided by law Thus, there is no warrant in the procedure, now obtaining in the civil Courts under the Civil Procedure Code, for an order for compulsory medical examination of a party against his wish

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1 L.R. (1905) A.C. 442.

*C.R.P. No. 567 of 1965. 3rd September, 1965.

This does not however mean that there could be no medical examination of a party and could not be claimed at all. What has to be noticed is that a party could not, against his wish, be compelled to undergo a medical inspection. It will be open to the parties, when there is no opposition, to secure medical inspection of a party under the aegis of the Court and suitable orders as to how and by whom the inspection is to be carried out could then be obtained

Any presumption from the refusal by a party to get himself medically examined under the orders of Court must be consistent with the surrounding circumstances and be a natural inference. The caution sounded in section 114 of the Evidence Act with reference to *Illustrations* (*g*) and (*h*) has to be borne in mind when drawing inference in any particular case.

Petition under Article 227 of the Constitution praying the High Court to revise the order of the District Munsif, Vriddhachalam (Election Commissioner) dated 24th March, 1965 in I A No 219 of 1965 in O P No 5 of 1965

K Sarvabhauman and *K Gopalachari*, for Petitioner

K. V. Venkataseshadri, for Respondent.

The Court made the following

ORDER.—This application under Article 227 of the Constitution has been preferred questioning the legality and regularity of an order passed by the Election Court under the Madras Panchayats Act, 1958, pending an Election Petition under this Act at the instance of the first respondent herein By the impugned proceeding, the Election Court has directed the petitioner herein to appear before the Medical Officer, Government Leprosy Subsidiary Centre, Vriddhachalam, and submit himself for medical examination, for the purpose of ascertaining the fact whether he was suffering from leprosy The petitioner herein is the first respondent in the Election Petition above referred to and the successful candidate as against the first respondent herein in the election held for one seat for the Srimushnam Town Panchayat, South Arcot district The election of the petitioner is challenged *inter alia* on the ground that he was suffering from leprosy and therefore disqualified under section 25 (2) (*a*) of the Panchayats Act. Under the Rules framed pursuant to the powers conferred under section 178 (2) of the Act, the District Munsif having territorial jurisdiction over the place in which the office of the Panchayat is situated is the Election Court and rule 3 specifically provides that the District Munsif exercising jurisdiction under the Rules shall be deemed to exercise such jurisdiction as *persona designata* and not in his capacity as a Munsif

In this case the first respondent herein (hereinafter referred to as the respondent) the other party being only a *pro forma* party, filed before the Election Court an application purporting to be under rule 6 (2) (*a*) and (*f*) praying that the respondent may be directed to appear in Court in person on a given date for a personal inspection and discovery both by the Court and by the Medical Officer referred to in his affidavit In his affidavit, the respondent stated that the order is necessary for examination of the blood by a Medical Officer and after necessary discovery and inspection the Medical Officer may be examined on his result about the inspection. The present petitioner, the successful candidate and the first respondent in the Election Petition, denied that he was suffering from leprosy, averred that it is a false and vexatious plea, and contended *inter alia* that there was no provision of law or procedure under which he could be compelled to submit himself for medical examination and test He, however, produced a medical certificate to show that he was not disqualified The Election Court (District Munsif, Vriddhachalam) took the view that "suffering from leprosy" was a statutory disability and by necessary implication the Court was clothed with such power to have it determined and it would be possible to so determine only by exercising the Court's jurisdiction in ordering the medical examination of the petitioner herein and test by the Government Medical Officer Certain observations in *George Swamidas Joseph* v *Sundari Edward*[1], a case under the Indian Divorce Act, are relied upon for arriving at the conclusion that the Court could compel the petitioner to submit himself for medical examination and test.

1. (1955) 67 L W. 676.

Mr K. Gopalachari, learned Counsel appearing for the petitioner, contends that the Election Court, which in this case had not even all the powers of an ordinary Court, the District Munsif functioning as Election Authority only as *persona designata*, had absolutely no jurisdiction whatsoever to order compulsory medical examination of the respondent in an Election Petition Learned Counsel contends that such power had not been given to the Election Court either by Statute or by Rules and that no other law warrants such interference with the liberty of the person and the sanctity of the human body Neither the Evidence Act nor the Civil Procedure Code provide for such compulsory medical examination and against a party respondent at the instance of a petitioner I shall immediately refer to three decisions bearing on the matter in consideration, which directly negative the existence of such power even in regularly constituted Courts

In *Venkateswarlu* v *Subbayya*[1], the controversy in the suit related to the legitimacy of the plaintiff, the defendant—the alleged father disputing the same The defendant applied, under section 151, Civil Procedure Code, for a direction from the Court to the plaintiff and his mother who figured as the next friend of the plaintiff to appear in person before the Court in order to enable a medical expert to take samples of their blood While negativing the existence of the power in the Court below to make the order prayed for, Raghava Rao, J. observed

"There is no provision either in the Civil Procedure Code or in the Indian Evidence Act which provides for a test of the kind sought to be taken by the defendant in the present case"

Referring to section 151, the learned Judge observed that it had been introduced into the statute book to give effect to the inherent powers of Courts as expounded by Woodroffe, J., in *Hukum Chand Boid* v *Kamalanand Singh*[2]

Again, in *Ranganatha* v *Lakshmi Achi*[3], Rajagopala Ayyangar, J, denied the existence of any such power for compulsory medical test on a human being without his or her consent under section 151, Civil Procedure Code. The learned Judge remarks

"Apart from cases of lunacy, which stand on a special or peculiar footing, there is no decision placed before me in support of the position Counsel invokes section 151, Civil Procedure Code, as enabling the Court to allow such an order I do not at all agree that section 151, Civil Procedure Code, has any application to a case of this sort To pass such an order is, in my opinion, tantamount to treating a human being as a material object, which no Court should do under its inherent power The Court might draw an adverse inference against a party who refused to examine himself or herself But I am unable to conceive of this Court having power to compel a medical test on a human being without his or her consent—apart from any statute which clothes the Court with such power"

In *Sreeramamurthy* v *Lakshmikantham*[4], the issue for determination was whether the plaintiff had become enciente and given birth to a child at any time as contended, by the opposite party to disentitle her in a claim for maintenance, her chastity being impugned. Umamaheswaram, J, after referring to Article 21 of the Constitution and certain observation of the Supreme Court in *A K. Gopalan* v *State of Madras*[5] observed.

"In the absence of any statutory provision compelling the medical examination of a party and restricting the enjoyment of presonal liberty of that person, it is not right to rely upon the general or inherent powers of the Court under section 151, Civil Procedure Code, to achieve that purpose. The examination of a party as a witness is however warranted by the provisions of the Code of Civil Procedure Medical examination is in certain cases specifically provided as under the terms of the Indian Lunacy Act."

The learned Judge followed the decision of Raghava Rao, J. in *Venkateswarlu* v. *Subbayya*[1], already referred to

It is surprising that in the face of the above decisions, particularly of the two decisions of this Court above referred to which had been placed before the learned District Munsif who was functioning as the Election Court, it should have proceeded to order the compulsory examination of the petitioner in its view that the Court ought not to sacrifice justice to notions of delicacy of its own. When placing

1. (1951) 1 M L J 580 I L R (1952) Mad 150
2 (1906) I L R 33 Cal 927.
3 (1955) 1 M L.J. 260 I L R. (1956) Mad. 66.
4 1955 An W R 13, A I R 1955 Andh. 207.
5 1950 S C J. 174: (1950) 2 M.L J. 42. A.I R. 1950 S C. 27.

reliance upon the observations in *George Swamidas Joseph* v. *Sundari Edward*[1], the District Munsif has failed to notice that the Matrimonial Causes Rules in England provide for medical inspection in proceedings for nullity of marriage on the grounds of impotence or incapacity of the petitioner But even there, a party could not be compelled to undergo medical inspection At page 679 this is noticed, Ramaswami, J , observing :

"The rules provide for a medical inspection of the parties in the case of nullity for impotence or wilful refusal to consummate, but the Court may grant a decree though the respondent refuses to submit to the inspection "

Again, in invoking the observation that

"In this country it may be held that by necessary implication the Court is armed with all the usual powers which in England are deemed requisite to ascertain the fact of incapacity and without which it would be impossible for any Court to exercise jurisdiction "

the learned District Munsif overlooks section 7 of the Indian Divorce Act, which provides that the Courts in India shall, in suits and proceedings under the Act, act and give relief on principles and rules which in the opinion of the Courts, are as nearly as may be conformable to the principles and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief It is in that context the Courts in this country are, by necessary implication, held as armed with the powers of Courts in England The powers are only in relation to the matrimonial causes, the subject of consideration in that decision.

Mr K V Venkataseshadri, learned Counsel appearing for the respondent, referred *in extenso* to passages from Wigmore on Evidence, Volume VIII, 3rd Edition. The learned author, after discussing how the common law privilege of the opponent not to bear testimony had been broken down by statutes, expresses his views as to corporeal exhibition, that is, duty to exhibit and power to compel thus, at page 184 .

"The duty to bear witness to the truth, by whatever mode of expression may be appropriate, includes necessarily the duty to exhibit the physical body, so far as the ascertainment of the truth requires it When a civil party's privilege at common law is abolished, why does he not come within this application also of the general testimonial duty, and become compellable to disclose to the Tribunal such facts as are ascertainable by inspection of his body ? There is no logical escape from this consequence The only objection on principle could be that, since the statutory charges affected in terms only the party's oral testimony and the documents possessed by him, his privilege remained as to other forms of testimony "

The learned author then proceeds to discuss whether a privilege at all existed in respect of a corporeal exhibition But it would be seen that the two or three classes of instances wherefrom the absence of privilege is gathered are cases where it is found special procedure is available for demanding corporeal exhibition The first instance referred to is the writ "*de ventre inspiciendo*" available to facilitate the proof of heirship, whenever a suppositious birth is to be feared The other instance given is with respect to the appeal of *Mayhem*, the historical predecessor of the modern action for personal injury, while inspection of the plaintiff's body could be demanded by the defendant Here it must be appreciated that the burden is upon the plaintiff to establish his case and would fail if he keeps back the best evidence that he could produce The third instance referred to is the bill for divorce or nullity, alleging impotency or like fact, and the fourth instance is whether a person sought to be restrained as insane is subject to medical inspection by order of Court. It will be found that in all these cases, the procedure for inspection has been recognised and provided for. At page 188 the learned author observes .

"The principle has received further extension, by modern public health statutes, to persons believed to be suffering from contagious diseases—in particular, leprosy and venereal diseases "

Such being the position and the powers of inspection of the human body being traceable to statutes or established rules of practice, I fail to see how the passages apart as views of a great jurist can help the respondent in this case.

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1. (1955) 67 L.W. 676.

Learned Counsel for the respondent referred to the inherent powers of a Court under section 151 To start with, the Election Court is not a Court as is generally understood. Its powers are circumscribed by its constitution Secondly, assuming it may have inherent powers in procedure, the exercise of any inherent power must be consistent with sound general principles of law and it cannot override the rights of parties. As observed in *Padamsen* v *State of U P* [1]:

> "The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in section 151 of the Code when the exercise of these powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature It is also well recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code"

In that case, the Court, under its inherent powers, purported to appoint a Commissioner to seize the account books in the possession of the plaintiff on the ground of defendant's apprehension that they would be tampered with. Pronouncing the invalidity of such an order, the Supreme Court observed :

> "The inherent powers saved by section 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it These powers are not powers over the substantive rights which any litigant possesses Specific powers have to be conferred on the Courts for passing such orders which would affect such rights as of a party Such powers cannot come within the scope of inherent powers of the Court in the matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure"

In the present case, the respondent has invoked the provisions under the rules providing for discovery and inspection as if the respondent's person is a thing or chattel, some dry document which could be the subject of discovery and inspection. But it is the birth right of a man to claim that there shall be no trespass to his person, unless provided by law and is justifiable, and it is that that is sought to be violated in the present case. Das, J, in *Gopalan* v *State of Madras* [2], remarks :

> "Civil rights of a peson are generally divided into two classes, namely, the rights attached to the person (*jus personarum*) and the rights to things *i e*, property (*jus rerum*) Of the rights attached to the person, the first and foremost is the freedom of life, which means the right to live, *i e*, the right that one's life shall not be taken away except under authority of law Next to the freedom of life comes the freedom of the person, which means that one's body shall not be touched, violated, arrested or imprisoned and one's limbs shall not be injured or maimed except under authority of law The truth of the matter is that the right to live and the freedom of the person are the primary rights attached to the person"

Learned Counsel for the respondent referred to the decisions of the Supreme Court in *Jagannath* v *Jaswant Singh* [3], and *Harischandra* v *Triloki Singh* [4]. I do not find what assistance the respondent can derive from those decisions It is not the contention on behalf of the petitioner that if the application in question could be maintained under the Civil Procedure Code, the respondent could not have the benefit of the procedure Rule 6 (1) of the Rules framed with reference to decision on election disputes relating to Panchayats provide for the election petition to be enquired into by the Election Court as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code, 1908 to the trial of suits. There is a proviso that it shall only be necessary for the Election Court to make a memorandum of the substance of evidence of any witness examined by it Sub-clause (2) of section 6 particularises certain powers which the Election Court shall have. The Supreme Court in the latter case, only points out when referring to similar provisions in the Representation of the Peoples Act, that the particularisation only puts the power in respect of the specified matters on a higher pedestal as the irreducible minimum which the Tribunal is to possess The other case, *Jagannath* v *Jaswant Singh* [3], in fact, emphasises that the Election Court cannot claim any general power Mahajan, C J observes therein at page 212 :

> "The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the *common law* and that *the Court possesses no common law power*"

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1 AIR 1961 SC 212, 219

2 1950 SCJ 174 : (1950) 2 MLJ 42 : A.I R. 1950 S.C 27, 108.

3 1954 SCJ 257 (1954) I MLJ. 480 AIR 1954 SC 210

4 1957 SCJ 297 AIR 1957 S.C. 444.

It should not however be understood that there could be no medical examination of a party and could not be claimed at all What has to be noticed is that a party could not, against his wish be compelled to undergo a medical inspection The Evidence Act contemplates the consideration by Court of expert evidence. It will be open to the parties to examine medical witnesses in support of their respective contentions In this case, this respondent himself, it is stated, has filed a medical certificate I shall not refer to the contents of the same as it would be a matter for consideration at the trial The Court may refuse to attach any weight to it without the respondent making available the medical officer who has given the certificate for examination on his report The opposite party may then cross-examine the expert on his opinion and report It will be open to the parties, where there is no opposition, to secure medical inspection of a party under the aegis of the Court and suitable orders as to how and by whom the inspection is to be carried out could then be obtained Parties may claim that more than one expert should examine Only there should be no compulsory direction for medical examination The Court will not stultify itself by passing an order when an individual cannot be compelled by law (the penalty may be withdrawal of certain procedural facilities) to undergo medical examination against his wish In this connection, I may refer to a passage in Phipson on Evidence, 10th Edition, at page 13, where it is stated :

" An inspection of a lady's mouth by a dentist was, however, refused under these rules (Order 19 and Order 23, rule 14, County Court Rules, 1936) as not being ' any property or thing the subject-matter of the action ' Irrespective of the above, however, medical inspection of a party may be ordered in various cases, *e g* in Chancery to determine pregnancy, in nullity suits on the ground of impotence, and refusal to submit is evidence against the party , and in actions for railway accidents (Regulation of Railways Act, 1868, section 26) , though bankrupts cannot be compulsorily examined with a view to their life insurance , nor can parties be ordered to exchange medical reports."

Whether and what adverse inference can be drawn in case a party refused to get himself examined by a medical expert under orders of Court it is not for me to state at this stage In this connection one has to bear in mind that any presumption from refusal must be consistent with the surrounding circumstances and be a natural inference. But in this case the petitioner himself is placing reliance on a medical opinion However, the caution sounded in section 114 of the Evidence Act with reference to *Illustrations* (*g*) and (*h*) has to be borne in mind when drawing inference in any particular case On this aspect it is desirable to advert to the decision of the Judicial Committee in *Sardar Gulbaksh* v *Gurdial Singh*[1], which may be relied on The question therein related to the succession to a jaghirdar who died leaving two widows, the elder childless and the younger with only a daughter and was, whether a posthumous son was born to the younger According to the law relating to the jaghir, failing a son, the estate would fall to a collateral male relative Gulbaksh, who claimed the estate, apprehensive of any spurious son being put forward, lodged a petition before the Collector that the younger widow may be medically examined by a doctor as a false report of pregnancy had been made in the mutation register and advanced pregnancy had been claimed for her. But she disappeared from the scene and could not be traced and ultimately went outside British territory When the investigation before the Collector proceeded a report was being circulated that a son had been born The attempt of Gulbaksh for a high officer to be sent and enquiry made failed as the authorities could not use force beyond the British frontier Long afterwards the junior widow appeared with a boy as the heir to the estate It will be noticed that the enquiry that was being proceeded with till then was either administrative or in the Revenue Courts. With reference to this, the Judicial Committee remarked at page 233 :

" It appears clear to their Lordships that she was purposely keeping out of the way, not only from August, 1915, when she disappeared, but from October, when her alleged son was born This further delay from October to March about five months was also deliberate It was for the purpose of preventing the possibility of any medical examination of her after such a long period throwing light upon the question of the birth of a child by her in October "

1. A.I R. 1927 P.C. 230

When referring to the conclusions of the Subordinate Judge in the Civil Suit that followed the proceedings on the administrative side, the Privy Council observes at page 233 .

"The disappearance of Bhagwan (junior widow) and the manifest approval of the co-widow, the refusal by her to come to the Court to submit to a medical examination, or even to remain for a reasonable period in her own old home, but in preference to go outside the jurisdiction of the Court and into the Native State, would in any view have thrown the greatest doubt upon the story of her having given birth to a son as alleged , and then the second feature of the case—her continued absence for a long period after the alleged birth—the whole of this appears to their Lordships to be but part of a transaction which was simply a nefarious plot "

At the trial the junior widow did not go into the box, though present in Court, and referring to this certain observations are made.

"Bhagwan's case had been the subject of prolonged investigation in the revenue Courts, and had been pronounced by them a bogus case She had appeared and told a story there, and it had not been believed She was, however, also present in this Civil suit, the issue in which was the legitimacy of the boy that she was putting forward as the jaghir of the estate Her non-appearance in answer to the challenge, that is to say, to disclose the actual fact as to her condition shortly after her husband Jawala's death, her disappearance into a foreign State, and all the other circumstances mentioned, had been established If her story were, notwithstanding all this, a true story, it was her bounden duty to give evidence in the suit telling the whole facts in support of her and her alleged son's case ; but she did not If under advice she did not do so that advice was of the worst description, and worthy of the animadversion above made But in any view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to discredit the truth of her case "

It must be noticed that the reference to her non-submission to any medical examination is a stage preceding the civil suit and not before the civil Court. It is difficult to draw from this that the Judicial Committee have in any way approved compulsory medical examination on the orders of a civil Court nor do their Lordships of the Judicial Committee indicate that an adverse inference could be made under all circumstances solely on a refusal to be medically examined. Their Lordships were only dealing with the inference to be drawn from all the surrounding circumstances and they do point out that by going into the witness box she could have explained the facts that tell against her. This decision cannot therefore be the basis for any conclusion that there could be an order for compulsory medical examination and that an adverse inference should be drawn against the party disobeying the order in every case solely from the disobedience to the order.

I must therefore hold that there is no warrant in the procedure now obtaining in the civil Courts under the Code for an order for compulsory medical examination of a party against the wish of the party Of course, the dismissal of the petition filed by the respondent, in the circumstances will not preclude the parties later applying to the Court for appropriate orders as indicated earlier if so advised. However, the order in the present form cannot stand and has to be discharged as beyond the powers of the Election Court, under the Panchayats Act.

The revision is therefore allowed, and the order in I A No 219 of 1965 set aside The parties will bear their respective costs here and in the Court below.

V K ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K SRINIVASAN.

Dhanapal Chetti .. *Petitioner**

v.

Avva Kanniah Chetti .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 10 (3) (a) (iii) and 19—Scope and applicability of section 19—Application by landlord for eviction under section 7 (3) (a) (iii) of the old Act before its repeal, dismissed—Fresh application under section 10 (3) (a) (iii) of the new Act—If barred by section 19

Civil Procedure Code (V of 1908), section 115—Revision under—Admission of additional evidence—Scope.

In 1958 the landlord who was carrying on his business in rented premises filed an application under section 7 (3) (a) (iii) of the repealed Act [Madras Buildings (Lease and Rent Control) Act,

*C R P No 1958 of 1962 and C M P. No. 1001 of 1966. 25th March, 1966.

1949] for eviction of his tenant and for recovery of his own premises for the purposes of his business That application was dismissed on the ground that under the old Act, the landlord who was in occupation, for the purposes of his business, of a premises as a tenant, was not eligible to the relief of eviction of his tenant from premises which might be the landlord's own. The new Act (Madras Act XVIII of 1960), however, made a departure and enabled the landlord to obtain possession of the premises which he had let out, so long as he was not occupying for the purposes of his business a non-residential building of his own Under the new Act, therefore, the possession of rented premises for the purpose of a business is no bar to obtaining the eviction of a tenant from the premises which belongs to the landlord After the new Act came into force the landlord filed a fresh application for eviction under section 10 (3) (*a*) (iii) of the new Act On the question whether this application was barred by section 19 of the new Act which enacted a rule of *res judicata*,

Held, the application under the new Act was not barred by section 19.

The former proceeding was under a provision of law which restricted the scope of an application for eviction more than the corresponding provision of the new Act did When the new law was enacted, the right of the landlord was enlarged In order that the principle of *res judicata* may apply, the point which was decided and which arises for decision in the later case should be substantially the same and that can hardly be so when there is a change in the law resulting in the identity of the question for decision being altered

There is no scope for the admission of additional evidence and for consideration of such evidence in a revision proceeding under section 115 of the Civil Procedure Code (V of 1908)

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Chingleput, in C R P No 84 of 1962 in C M.A. No. 9 of 1961, Sub-Court, Chingleput, R C O P No 20 of 1960, District Munsif's Court, Tiruvellore, etc

R Gopalaswamy Ayyangar and *O. Radhakrishnan*, for Petitioner.

N Sivamani and *M V. Krishnan*, for Respondent.

The Court delivered the following

JUDGMENT —The petitioner is the tenant In R C O P No 20 of 1960 the respondent landlord sought for eviction of the tenant under section 10 (3) (*a*) (iii) of the Act of 1960 The landlord claimed that he was carrying on business in a rented premises, which premises was wholly inadequate to his needs On that ground he purchased the premises in question In 1958, he had filed an application R C O P No 22 of 1958 under the repealed Act, which was dismissed, as also an appeal therefrom The ground upon which that petition was dismissed was that under the old Act, the landlord who was in occupation, for the purposes of his business, of a premises, to the possession of which he was entitled, that is to say, as a tenant, was not eligible to the relief of eviction of his tenant from premises which might be the landlord's own The new Act, by section 10 (3) (*a*) (iii), however made a departure, and enabled the landlord to obtain possession of the premises which he had let out, so long as he is not occupying, for the purpose of his business, which he is carrying on, a non-residential building which is his own Under the new Act, therefore, the possession of rented premises for the purpose of a business is no bar to obtaining the eviction of a tenant from the premises which belongs to the landlord After the new Act came into force, the landlord filed a fresh application He stated that he is not occupying any premises of his own for the purposes of his business and sought the eviction of the tenant. The contention put forward by the tenant was that the application was barred by *res judicata*. It was urged that there was no change of circumstances entitling the landlord to maintain his petition. It was also stated that the landlord had two other non-residential buildings in the locality.

The House Rent Controller thought that though the new Act enlarged the scope of an application for eviction by section 10 (3) (*a*) (iii), as contrasted with section 7 (3) (*a*) (iii) of the old Act, yet, the authority had to be satisfied about the *bona fides* of the landlord In disposing of the previous application, it was then held, that there were no *bona fides* On behalf of the landlord, it was urged that the question of *bona fides* cannot possibly remain static and that it must necessarily change in the changed circumstances. The House Rent Controller found that the landlord had demolished one of the non-residential premises owned by him after the disposal of the earlier petition. Nevertheless, the Rent Controller was

not satisfied that there was a change in the circumstances It was also held that premises No. 35/1 was available for occupation of the landlord On these facts, the lack of *bona fides* was inferred by the Rent Controller who dismissed the petition

In the appeal from this order, the appellate authority, the Principal Subordinate Judge, Chingleput, agreed that though there was a change in the law, the question relating to *bona fides* had still to be considered. He also thought that section 19 of the new Act barred the present application

The landlord moved the District Judge in revision The learned District Judge observed that there could be nothing like *bona fides* in the abstract He, however, held that the Subordinate Judge had found the present petition to be *bona fide* He was satisfied that the petitioner did require the premises for his own business, and when the landlord was not in occupation of a premises which is his own, the law entitled him to an order of eviction He accordingly set aside the orders of the authorities below and directed the tenant to deliver possession of the premises to the landlord within two months.

In this revision petition, this order of the District Judge in revision is challenged.

I may refer more specifically to the finding of the Subordinate Judge. In paragraph 4 of his order, it is stated .

"It is contended before me that it is *bona fide* application, because otherwise there was no need for the landlord to lock up a large sum of Rs 9,100 and buy this building The very fact that he has purchased a new building at such cost now shows that it is a *bona fide* application This may be so, and I am led to believe that it is a *bona fide* application . . "

The first part of this extract is obviously a resume of the arguments advanced before the learned Subordinate Judge and the last sentence is hardly categorical enough to operate as a finding on the question of *bona fides*. Nevertheless, it may be assumed that the learned Subordinate Judge was inclined in favour of the landlord on the question of *bona fides.*

Mr. R Gopalaswami Ayyangar, for the tenant, contends that section 19 of the Act bars the present application. Section 19, in so far as it is material, reads thus :

"*Decisions which have become final not to be re-opened.*—The Controller shall summarily reject any application under sub-section (3) of section 10 . which raises between the same parties or between parties under whom they or any of them claim substantially the same issues as have been finally decided or as purport to have been finally decided in a former proceeding (1) under this Act, or (2) under any other law from time to time in force before the date of the commencement of this Act and relating to the matters dealt with under this Act"

Broadly stated, this section does enact a rule of *res judicata*. But, in applying any such rule, it is obvious that the terms of the provision should be strictly construed What is it that stands barred by this provision? It is an application under section 10 (3), which raises substantially the same issues as have been decided in the former proceeding under the earlier Act The former proceeding was under a provision of law which restricted the scope of an application for eviction more than the corresponding provision of the new Act does When the earlier application was made and disposed of the position was that the landlord was in occupation of a premises for the purpose of his business, to the possession of which premises he was then entitled; that is to say, he was in occupation of a rented premises, and so long as his right to possession of that premises could not be interfered with, section 7 (3) (*a*) (iii) did not enable the landlord to obtain an order of eviction against his own tenant. But when the new law was enacted, the right of the landlord was enlarged to a certain extent. Apparently, the Legislature thought that it was undesirable to impose a restriction upon a person carrying on his own business and preventing him from obtaining possession of his own premises for that purpose from a tenant who might be in occupation of that premises The new provision therefore only required that the landlord should not be *occupying* for the purposes of his business a non-residential building *which is his own* If the premises which he was occupying for the purposes of his business is not his own, then he can move under section

10 (3) (*a*) (iii) and seek the eviction of the tenant of his non-residential building, so as to enable him, the landlord, to carry on his business in his own premises.

Though, in the earlier proceeding, it was contended by the landlord that the rented premises which he was occupying was not sufficient for his business and that was why he had purchased the building in question, section 7 (3) (*a*) (iii) of the old Act did not cover such a requirement The question of *bona fides* was altogether out of place in the disposal of that earlier application Even if the application was *bona fide*, section 7 (3) (*a*) (iii) would not apply to the facts, and notwithstanding the *bona fides* of the application, that petition was liable to be dismissed Whatever observations the Rent Controller and the appellate authority might have made in the disposal of the earlier application on the question of *bona fides* were certainly wholly irrelevant, because there the case of the landlord then did not come within the scope of section 7 (3) (*a*) (iii) at all.

This point must be borne in mind in considering the scope of section 19.

A decision of Rajamannar, C J , in C R P No 855 of 1956 has been referred to by Mr. Gopalaswami Ayyangar That was a case where the National Star Assurance Co sought the eviction of the tenant from certain premises on the ground of its own requirement. It appears that the Insurance Company had purchased the building at a high cost with a view to locate its head office there. It had till then been carrying on the business in rented premises, but an order for eviction against it had been obtained by its landlord of the rented premises. The petition was dismissed, but on appeal it was allowed When the matter was pending in revision before the High Court, the Life Insurance Corporation took over the business of all the insurance companies The petitioner Insurance Company was no longer in existence carrying on a separate life insurance business The learned Chief Justice held that in those circumstances the order for eviction in favour of the National Star Assurance Company would cease to be effective. I am really unable to see anything in this judgment which helps the determination of the contentions in the present case Nor do I think it necessary to refer to a decision of Ramaswami, J., in *Porakutti* v. *Velapapil Nammath*[1], where the learned Judge dealt extensively upon the meaning of the expression " *bona fides* ".

A decision directly bearing upon the point was rendered in C R P. No 2626 of 1964 by Veeraswami, J The learned Judge observed

> " The other point urged is rested on the doctrine of *res judicata* Admittedly, the law has been changed since this petition was filed The doctrine of *res judicata* will apply only so long as there is no change of circumstances so far as the Rent Control Acts are concerned What is contended is that the change of position in law might be relevant only in respect of eviction but may not be in respect of *res judicata*. I am unable to accept that contention "

Though the passage is cryptic, it seems to me that the learned Judge accepted the position that in order that the principle of *res judicata* may apply, the point which was decided and which arises for decision in the later case should be substantially the same, and that can hardly be so when there is a change in the law resulting in the identity of the question for decision being altered

I am accordingly satisfied that in the present case the contention of Mr. Gopalaswami Ayyangar that section 19 applies cannot be maintained

The petition is, therefore, dismissed with costs Time to vacate four months. An application was filed for admitting additional evidence I am not satisfied that there is any scope for the admission of additional evidence and for consideration of such evidence in a revision proceeding under section 115, Civil Procedure Code. That petition is also dismissed There will, however, be no order as to costs.

V.K. *Petition dismissed.*

1. (1953) 2 M L J. 622.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR M. ANANTANARAYANAN, *Officiating Chief Justice.*

Sennammal .. *Petitioner**

v.

K. Natarajan and others . *Respondents.*

Partition Act (IV of 1893), section 4 (1)—Coparcener's right to buy out stranger transferee's share under—If can be defeated because transferred share admits of separate and convenient enjoyment—Application to buy out stranger transferee—Delay in the making of—Effect.

The manifest intention of section 4 (1) of the Partition Act is that where a transferee sues for a partition in respect of an undivided share in a dwelling house, which he has purchased, the members of the family have an option to buy him, because it is in accord with equity and justice that they need not suffer a third party or a stranger to live as a co-dweller, in the same family house This right of a coparcener cannot be defeated merely because the share purchased by the stranger-transferee can be easily severed and enjoyed as a separate share without disturbing the enjoyment of the remaining share by the other coparceners

An application to buy out the transferee should normally be made before any preliminary decree was passed in the partition suit But the fact that an application in this behalf was made belatedly will not affect its maintainability However, it may certainly affect the terms upon which the petitioner in such an application should be permitted to buy the transferee.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Sub-Court, Coimbatore, in I.A. No. 152 of 1964 in I A. No. 530 of 1963 in O S No. 241 of 1961.

S. Mohan, for petitioner

K. Chandramouli, for *T. R. Ramachandran*, for Respondent.

The Court made the following

ORDER.—Section 4 of the Partition Act, IV of 1893, is very clear that, when the transferee of a share of a dwelling house belonging to an undivided family, who is not a member of that family, sues for partition, the Court is bound to value that share, and to have it conveyed to any member of the family, who is prepared to buy out the transferee. In the present case, the agrument on behalf of the transferee, who has instituted this revision proceeding, is that the Commissioner who made a report in March, 1964, has specifically stated that the two-third share purchased by the transferee can be easily severed and enjoyed as a separate share without disturbing the enjoyment of the one-third share by the other coparcener or coparceners In other words, certain features of this dwelling house render it practicable that the two-third share may be thus separately enjoyed, by the member of the family to whom it is allotted at the partition, or even by a transferee.

But this argument does not really help the revision petitioner. The manifest intention of section 4 (1) of Act IV of 1893 is that where a transferee sues for partition in respect of an undivided share in a dwelling house, which he has purchased, the members of the family have an option to buy him, because it is in accord with equity and justice that they need not suffer a third party or a stranger to live as a co-dweller, in the same family house. The question has nothing to do with the degree to which that undivided share could be separately enjoyed, or conveniently admits of such enjoyment. The section is perfectly clear, and the transferee of such an undivided share has no right to resist an application by any of the members of the family, who are parties to the partition suit, and who undertake to buy out the transferee on a just and proper valuation

But, as observed by Macleod, C J. in *Khanderao Dattatraye* v. *Balakrishna Mahadev*[1], such an application should be promptly made, and there is no justification for undue delay in making it. The learned Judge stated that " in ordinary cases such an application would be made before any preliminary decree was passed in the suit." In the present case, the application was made only a year thereafter. That does not affect the maintainability of the application, however, for, instances

*C.R.P. No. 1657 of 1964. 29th April, 1966.

1. I.L.R. 46 Bom. 341.

are brought to my notice where relief under section 4 of the Act has been granted even in Second Appeal.

However, it may certainly affect the terms upon which the petitioner in such an application should be permitted to buy out the transferee After an evaluation of this share by the Commissioner, the Court may consider whether the value would have been the same, or lower, at the time of the preliminary decree in 1963 If the present value is higher, the transferee is actually benefitted by the delay in making the application, and nothing further need be done. But, if the present value is the same as the value at the time of the preliminary decree, the Court may consider whether the transferee would not be entitled, in equity, to interest on the same, at six per cent per annum from the date of the preliminary decree itself. With these observations, the revision proceeding is dismissed. No order as to costs.

V.K. ——— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE T. VENKATADRI.

The British Machinery Supplies Co , by Power-of-Agent and Branch Manager, Revachand Teckwani .. *Petitioner**

v.

Devaraj and others . *Respondents.*

Hire Purchase—Hirer in possession and use of the goods—Pledge of the goods by the hirer—Default in payment of instalments by hirer under the agreement—Option to terminate agreement not exercised by the owner—Right of parties—Owner not entitled to sue pledgee for recovery of the goods

In all hire-purchase agreements, there is a dual nature, where a hirer can transfer the benefit of the hiring alone while retaining the option to purchase , or he can assign the option alone, remaining in possession of the goods until the hire purchase price is paid, or he can assign his entire rights under the agreement, in which case the assignee becomes entitled both to the use of the goods and to the option to purchase

A prohibition against the assignment must be so framed as to cover both the assignment of the benefit of hiring and the transfer of the option to purchase.

A condition in the agreement that the hirer shall not sell the goods does not prohibit the hirer from assigning the benefit of hiring The pledge by the hirer would not constitute a breach of the hire-purchase agreement, in the absence of a provision in the agreement expressly prohibiting the hirer from pledging or parting with possession of the goods.

Once there was default in the payment of the instalments the owner could have terminated the agreement, but in the instant case he has not exercised that right At the time of the pledge, the hirer had the legal possession of the goods and had a right to use the same In the circumstances, the hirer had a right or interest in the goods when he pledged the goods The owner is not entitled to sue the pledgee to recover the goods He can sue the hirer for damages and for the balance of the price

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the Court of Small Causes (Full Bench), Madras, dated 1st October, 1962 and passed in N T A No. 52 of 1962 (S C S No 5827 of 1961 on the file of the Court of Small Causes (Third Judge), Madras).

R. Rangachari, for Petitioner.

T. Venkatasubramaniam, for 2nd Respondent.

K. Venkateswara Rao, amicus curiae.

The Court made the following

ORDER —An interesting question of law arises in this revision petition, *viz.*, whether the plaintiff, the owner of a sewing machine, who sold it under a Hire-Purchase agreement to the first defendant, could recover it from the third defendant who was a pledgee from the first defendant. The Courts below have dismissed the suit of the plaintiff, as far as the third defendant was concerned. The plaintiff

*C.R.P No. 1142 of 1962. 20th June, 1966.

has, therefore, preferred this revision petition contending that a decree should be passed against the third defendant also

Learned Counsel for the petitioner contended that, as per the terms of the agreement, the first defendant had no right to pledge the sewing machine with the third defendant and therefore his client would be entitled to recover the machine from whomsoever it remained Let us, therefore, consider the rights the first defendant would be entitled to in the goods during the subsistence of the Hire-purchase Agreement. Lord Macnaghten says in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) *Ltd* [1].

" It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee "

It is true that the first defendant had no title, at the time of pledging the article, but certainly he had an interest in it, as between him and the plaintiff There can be no doubt that such interest that the first defendant had would pass to the pledgee. The interest of the hirer became vested in the pledgee As observed by Channell, J , in *Belsize Motor Supply Co* v. *Cox* [2]

" A pledgee or purchaser takes such title as his pledgor or vendor has In the view I take of the agreement the hirers did not lose their right to purchase the cab merely by making default in the payment of the instalments . On default . the agreement gives the plaintiffs an option to take possession of the cab and to terminate the agreement That option has to be exercised, otherwise the agreement continues in force , until it is exercised the right of the hirers subsists to pay all the purchase-money and acquire the property in the cab If this be the true view of the agreement, then the defendant has acquired an interest in the cab, and, that being so, the proper judgment will be for the amount remaining unpaid . . "

In this case, therefore, the petitioner could only have a right to get the unpaid instalments, but he has certainly no right to recover anything more than that sum. Nor has he a right to recover the machine itself.

In all hire-purchase agreements, there is a dual nature, where a hirer can transfer the benefit of the hiring alone while retaining the option to purchase; or he can assign the option alone, remaining in possession of the goods until the hire-purchase price has been paid, or he can assign his entire rights under the agreement, in which case the assignee becomes entitled both to the use of the goods and to the option to purchase. Modern hire-purchase agreements invariably contain stringent conditions prohibiting assignment and enabling the owner to resume possession and terminate the hiring or the entire agreement in the event of breach A prohibition against assignment must be so framed as to cover both the assignment of the benefit of the hiring and the transfer of the option to purchase Thus a condition in the agreement that the hirer shall not sell the goods does not prohibit the hirer from assigning the benefit of hiring The pledge by the hirer would not constitute a breach of the hire-purchase agreement, in the absence of a provision in the agreement expressly prohibiting the hirer from pledging or parting with possession of the goods Even the provisions of the Contract Act save the pledgee at least to the extent of the pledgor's own interest in the goods. In this case, the petitioner himself stated that there was default in the payment of money Once there was default in the payment of instalments of the hire-purchase agreement, the petitioner could have terminated the agreement, but he has not terminated the agreement, *i e* , he has not exercised the right of termination At the time of the plegde, the first defendant (hirer) had legal possession of the chattel and he had a right to the goods In those circumstances, it is not possible for me to say that the first defendant had no right or interest in the goods when he pledged it to the third defendant Further, there is absolutely no evidence to warrant the conclusion that the third defendant was aware that the first defendant was only a hirer and not the true owner of the sewing machine. The petitioner cannot ask the third defendant to return the sewing machine He can only file a suit for damages for the payment of unpaid instalments by the first and second defendants for the balance of the unpaid instalments due and payable by the first defendant under the hire-purchase

1. L.R. (1893) A.C. 414 at 420.
2 L.R. (1914) 1 K.B. 244 at 252.

agreement The plaintiff is not, therefore, entitled to recover the sewing machine from the third defendant.

Learned Counsel for the third defendant pointed out that as far as the third defendant was concerned, the suit was not maintainable because it was in the nature of specific performance of a contract. Without going into the merits of this contention, it is enough for my limited purpose to declare that the first defendant had an interest in the chattel which he pledged with the third defendant and that the third defendant was a *bona fide* pledgee. Once a decree is passed against the first defendant for the balance of the instalments, the petitioner cannot recover the sewing machine from the third defendant There is no reason to interfere with the orders of the Courts below.

The Civil Revision Petition is dismissed There will be no order as to costs.

K S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE K. VEERASWAMI AND MR JUSTICE M NATESAN.

Haji J A Kareem Sait .. *Petitioner**

v.

The Deputy Commercial Tax Officer, Mettupalayam .. *Respondent.*

Central Sales Tax Act (LXXIV of 1956), *sections* 9 (3) *and* 13 *and Central Sales Tax (Madras) Rules,* 1957, *rule* 5 (7)—*Notice of assessment of escaped turnover of inter-State sales—Action under rule* 5 (7) *unauthorised and* ultra vires—*Sustainable under section* 9 (3)—*Levy on collection—State Sales Tax Authority empowered to levy and collect.*

Interpretation of Statutes—Legislation by Parliament by reference and adoption of State Law—Existence of the local law essential—Local law re-enacted in substantial form—Validity of legislation by reference and adoption.

Rule 5 (7) of the Central Sales Tax (Madras) Rules is unauthorised and is *ultra vires* the State Government This sub-rule provides for (1) assessment of escaped turnover, (2) period of limitation for applying the power to assess such turnover and (3) determination by best judgment of the escaped turnover The provisions of the Central Act do not themselves provide for any of these matters and certainly section 13 (4) of the Act does not specifically confer power on the State Government to make a rule like sub-rule (7)

But section 9 (3) of the Central Act enables and empowers the department to take the proceedings against the assessee, and enacts that the State Sales Tax Authorities shall assess, collect and enforce payment of the Central Tax in exactly the same way as under the local Sales Tax Law and for that purpose the authorities will have the same powers as they possess under such law to assess, collect and enforce local sales tax

Where Parliament intends to adopt, for purposes of Central legislation, any particular provisions of a State law, it can do so by reference to those provisions instead of reiterating them *verbatim* But it cannot make a law adopting the provisions of a local law which did not exist at the time Looking at the substance and not form of the matter, section 16 of the Madras General Sales Tax Act of 1959 has substantially re-enacted the provisions of the 1939 Act relating to assessment of escaped turnover and the period of limitation for exercising that power. Section 9 (3) is therefore not unconstitutional

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed with W P No 4052 of 1966 on the file of the High Court, the High Court will be pleased to issue a Writs of Prohibition, prohibiting the respondent herein in all the petitions from taking any further action under the Central Sales Tax Act, 1956 against the petitioner herein in all the petitions in pursuance of his Notices Ref Nos CST/60-61, CST/61-62 etc, for the assessment years 1960-61 to 1964-65 respectively.

M K Nambiar for *K K Venugopal* and *S Ramalingam*, for Petitioner.

Special Government Pleader on behalf of Respondent.

The Advocate-General for the Attorney-General of India.

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*W.P. Nos. 4052 to 4056 of 1965. 24th June, 1966.

The Judgment of the Court was delivered by

Veeraswami, J.—The validity of sub-rule (7) of rule 5 of the Central Sales Tax (Madras) Rules, 1957 and sub-section (3) of section 9 of the Central Sales Tax Act, 1956 is questioned in these petitions for prohibiting the respondent, the Deputy Commercial Tax Officer, Mettupalayam from taking further action against the petitioner under the Central Sales Tax Act, 1956, in pursuance of his notices in September, 1965, proposing to bring to tax certain turnovers of inter State sales for the years 1960-61 to 1964-65 on the ground that such sales were not made on the basis of 'C' declaration of dealers of other States. The petitioner states that he has been carrying on business as dealer in areca-nuts in Mettupalayam town. During these years, he admittedly effected sales of areca-nuts to dealers outside the State of Madras He did not register himself as a dealer as required by section 7 of the Central Sales Tax Act, 1956. According to him, being uneducated he was not aware of the provisions of this Act and had failed to collect even one naya paise as sales tax from any one of the purchasers and to make returns of his transactions He was, however, as he had said, maintaining correct accounts as well as invoices and keeping records relating to each transactions effected by him The Intelligence Wing of the Sales Tax Department reported to the respondent about the petitioner's transactions during the said years and action was taken by the respondent to assess the transactions by serving notices on the petitioners to show cause why he should not be assessed as proposed The notices set out the circumstances under which action was taken and the turnover for each year to be assessed at 7 per cent. under the Central Sales Tax Act as the petitioner had not sold on 'C' declaration forms of the dealers of other States.

The contention for the petitioner is that the action taken by the respondent to assess his alleged escaped turnover is wholly without jurisdiction and that Rule 5 (7) of the Central Sales Tax (Madras) Rules, 1957 is *ultra vires* section 13 (3) and (4) of the Central Sales Tax Act. Reliance being placed for the respondent on section 9 (3) of the Act, the sub-section, according to the petitioner's submission is unconstitutional.

We are of the view that the petitioner's first contention is well founded but not the second Section 13 of the Central Act provides for power to make Rules Sub-section (1) authorises the Central Government to make Rules providing for certain matters specifically mentioned and the Rules made by the Central Government are required by sub-section (2) to be placed before both Houses of Parliament Under sub-section (3), the State Government is given the power to make Rules to carry out the purposes of the Act but the Rules so made should not be inconsistent with the provisions of the Act and the Rules made under sub-section (1) The next sub-section enumerates certain purposes in respect of which the State Government will have power to make Rules and this power is given without prejudice to the powers conferred by sub-section (3) In purported exercise of the powers conferred by sub-sections (3) and (4) of section 13, the State Government made the Central Sales Tax (Madras) Rules, 1957 of which rule 5 provides for submission of returns and the procedure to assess them Sub-rule (5) says that after the close of the year, the assessing authority shall, after such scrutiny of the accounts and after such enquiry as he considers necessary, satisfy himself that the return or returns filed are correct and complete and finally assess under a single order the tax or taxes payable under the Act for the preceding year or for the year to which the return submitted relates as the case may be The sub-rule further provides that if the assessing authority finds that the returns are incorrect or incomplete, he shall assess the turnover to the best of his judgment after giving the dealer an opportunity to prove the correctness and completeness of his returns Sub-rule (7) is as follows :

"If, for any reason, the whole or any part of the turnover of business of a dealer had escaped assessment to tax in any year, the assessing authority may, at any time within five years next succeeding that to which the tax relates, determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable on such turnover after issuing a notice to the dealer and after making such enquiries as he considers necessary"

This sub-rule, therefore, provides for (1) assessment of escaped turnover, (2) period of limitation for applying the power to assess such turnover, namely, five years and

(3) determination by best judgment of the escaped turnover The provisions of the Central Act do not themselves provide for any of these matters and certainly section 13 (4) does not specifically confer power on the State Government to make a rule like sub-rule (7). The Madras General Sales Tax Act, 1939 by section 9 provided power for the assessing authority to assess the turnover on the basis of the return and where it does not accept the correctness or completeness of the return, to assess it to the best of his judgment and by section 19 (1) authorised the State Government to make Rules to carry out the purposes of the Act, and by sub-section (2) certain matters were particularised without prejudice to the general power to make Rules for the purposes of the Act in respect of which the State Government could make Rules One of such matters specifically mentioned is " the assessment to tax under this Act of any turnover which has escaped assessment, and the period within which such assessment may be made not exceeding five years ". Section 13 (4) of the Central Sales Tax Act does not contain any such specific enabling provision, though the Act was made when the Madras General Sales Tax Act, 1939 was still in force which the Parliament should have been aware of The Madras General Sales Tax Act, 1959 has not left to the rule making authority the power to make rule relating to the assessment of escaped turnover but section 16 of that Act itself provides for power to assess escaped turnover and prescribed also the procedure and period of limitation for the exercise of that power as well as the power to assess such turnover by best judgment. In the absence of an enabling power provided for by section 13 (4) of the Central Act, sub-rule (7) of rule 5 of the Central Sales Tax (Madras) Rules is unauthorised and is *ultra vires* the power of the State Government.

Power to assess escaped turnover is an original power, whether it is applied to a case of failure to make returns or reopening of an order of assessment already made in order to bring to tax what was escaped assessment In either case, the power is part of and included in the power to make assessments But it does follow from it that by reason of the existence of such a 'power' the State Government could provide for limitation for exercise of power to assess escaped turnovers by best judgment No doubt limitation is procedural but it is also substantive A rule covering those matters cannot, therefore, be made unless it be in exercise of specific conferment of enabling rule-making power This Court in *Messrs Solar Works* v *Employees' State Insurance Corporation, Madras*[1] took the view that where an Act itself did not provide for limitation with reference to a particular matter and the delegation of power to make Rules was conferred by a section of the Act which did not expressly or impliedly relate to the power to prescribe time, the authority to which the power was delegated, namely, the State in that case could not make a rule prescribing limitation We have already pointed out that the legislative practice at least so far as this State is concerned appears to be that in the Sales Tax Law, express and specific conferment of power is made to make a rule providing for assessment of escaped turnover, limitation for exercise of the power and the manner in which the assessment should be made, including by best judgment The charge under the Central Act as well as the State Acts is on the turnover which means the actual turnover. A turnover determined by best judgment is what the authority, which determined it, had taken to be the turnover which need not necessarily be the actual turnover. Vide *Commissioners of Customs and Excise* v *Cure and Deeley, Ltd*[2] A rule providing for determination of turnover by best judgment could only be valid if there is specific conferment of the enabling power upon the rule-making authority The Revenue, however relies upon section 13 (3) of the Central Act to sustain sub-rule (7) But section 13 (3) is in general terms and confers power to make Rules only to carry out the purposes of the Act Nowhere in the Central Act is there any indication that one of its purposes is to provide for limitation for the exercise of the power to assess escaped turnover and to determine such turnover by best judgment. We hold that sub-rule (7) at least in so far as it provided for limitation and determination of escaped turnover by best judgment is in excess of the rule-making power and the sub-rule, as a whole should be struck down as invalid.

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1. (1964) 2 M.L J. 223.

2. (1961) 3 All E R. 641.

That does not, however, conclude the matter in favour of the assessee. As we indicated, the Revenue relies on section 9 (3) of the Central Act and contends that even in the absence of sub-rule (7), the respondent will have the power and jurisdiction to take action, as he has, against the petitioner. Support is sought to be derived for this contention from the majority view in *State of Mysore* v *Lakshminarasimhiah Setty and Sons*[1], on the scope and effect of section 9 (3) In that case the Supreme Court decided with reference to the provisions of the Mysore Sales Tax Act and sections 8 (2) and 9 (1) and (3) of the Central Act Though the sales, there were of inter-State character, they were nevertheless not liable to tax under the Central Sales Tax Act, as they were not first sales within the Mysore State which alone were made liable to tax at a single point at that stage under the Mysore Act This decision was reached on the majority view that whatever ambiguity existed in relation to the expression "in the same manner" in section 8 (2), section 9 (1) dispelled it and made it clear that section 8 (2) dealt with not only the calculation of the rates but also the manner of levy of the tax The Supreme Court held that "levied" in section 9 (1) of the Central Act referred to the expression "levied" in section 5 (3) (*a*) of the Mysore Sales Tax Act We do not, therefore, think that this decision is directly in point for the Revenue, because, the question we have to decide now is somewhat different, namely, whether sub-section (3) of section 9 attracts to the working of the Central Act, the powers of assessing authorities under the State Acts to assess escaped turnover.

As we mentioned earlier, the Central Act itself does not contain provisions relating to the machinery and powers of assessment and collection of Central sales tax But the scheme of the Central Act shows that instead it assimilates and attracts for its purpose, by reference to the relative provisions of the Sales Tax Law in force under the State Acts as to machinery for and powers of assessment and collection of tax We do not think it necessary to reproduce the circumstances in which Article 286 of the Constitution came to be amended and the Central Sales Tax Act, 1956 was enacted The Preamble to this Act sets out its purpose quite clearly and accordingly the Act contains definition of when a sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce, prescribes the locale of such sale and declares its liability to the Central tax The rate of tax is fixed by section 8 which has, in certain circumstances, reference to the rate of tax obtaining under the State Acts The next section provides for levy and collection of tax and penalties Sub-section (1) says that inter-State sales tax shall be levied and collected by the Government of India in the manner provided in sub-section (3) in the State from which the movement of the goods commenced Sub-section (1) has a proviso which we need not refer to Sub-section (2) deals with collection of penalties imposed on a dealer under section 10-A. Sub-section (3) reads :

> "Th authorities for the time being empowered to assess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, and subject to any Rules made under this Act, assess, collect and enforce payment of any tax, including any penalty, payable by a dealer under this Act in the same manner as the tax on the sale or purchase of goods under the General Sales Tax Law of the State is assessed, paid and collected, and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State, and the provisions of such law, including provisions relating to returns, appeals, reviews, revisions, references, penalties and compounding of offences, shall apply accordingly
>
> Provided that if in any State or part thereof there is no general sales tax in force, the Central Government may, by Rules made in this behalf, make necessary provision for all or any of the matters specified in this sub-section, and such Rules may provide that a breach of any rule shall be punishable with fine which may extend to five hundred rupees, and where the offence is a continuing offence, with a daily fine which may extend to fifty rupees for every day during which the offence continues"

The last sub-section assigns the proceeds of any tax levied and collected under the Central Act in any State to that State, which shall retain the same. It is manifest from section 9 that though the Central tax is levied and collected for and on behalf of the Government of India, it is appropriated eventually by the particular State entitled to it and the administration of the provisions of the Central Sales Tax Act

1. (1965) 16 S.T.C. 231.

is left to the authorities functioning under the State Acts While sub-section (1) of section 9 directs that the Central Sales Tax shall be levied and collected in the manner provided in sub-section (3), the latter makes available the authorities under the State Acts and their powers under those Acts to assess, collect and enforce payment of any local tax, to assessment, collection and enforcement of Central Sales Tax. In other words, sub-section (3) provides for two matters : (1) the authorities empowered to assess, collect and enforce payment of local tax under the State law are authorised to assess, collect and enforce payment of the Central Tax on behalf of the Government of India and subject to the Rules made under the Act, in the same manner as the tax on the sale or purchase of goods under the State Law is assessed, paid and collected, and (2) while acting under that authority, the authorities concerned will exercise all or any of the powers they have under the general sales tax law of the State. The State Sales Tax Authorities are thus charged with the duty to assess, collect and enforce payment of Central sales tax and in discharging this duty, they have all the powers which they possess under the State Sales Tax Law The words " in the same manner " in sub-section (3) of section 9 of the Central Act clearly show, in our opinion, the true scope and effect of that sub-section, to wit, the State Sales Tax Authorities shall assess, collect and enforce payment of the Central Tax in exactly the same way as under the local sales tax law and for that purpose the authorities will have same powers as they possess under such law to assess, collect and enforce local sales tax.

That being the effect of sub-section (3) of section 9 one has to turn to the provisions of the appropriate local sales tax law to see what powers the sales-tax authorities possess thereunder When the Central Sales Tax Act, 1956 was enacted, there was in force in the State of Madras, the Madras General Sales Tax Act, 1939 Section 9 of this Act prescribed the procedure for assessment of tax and conferred power to assess returns and compute tax and, where the returns are incorrect or incomplete, to assess turnover by best judgment Section 19 (2) (*f*) conferred on the State Goverment power to make Rules for assessment of escaped turnover and the period during which such assessment should be made not exceeding five years In exercise of this rule-making power, the State Government made Rules called the Madras General Sales Tax Rules, 1939 of which rule 17 provided for the procedure to assess escaped turnover and prescribed the period in this regard, namely, five years The power and procedure in relation to assessment of escaped turnover including limitation provided by section 9 and rule 17 are now substantially to be found in section 16 of the Madras General Sales Tax Act, 1959 It follows, therefore, that sub-section (3) of section 9 of the Central Act would enable the respondent to invoke those powers which he has under the local Sales Tax Law in assessing turnover which has escaped assessment in any year.

The contention for the petitioner is that, sub-section (3) is unconstitutional because it attracts for its purpose, for assessment, collection and enforcement of tax, the provisions of the Local Sales Tax Law for the time being in force and such legislation by reference amounts to abdication by the Parliament of its legislative powers. It is not disputed by the petitioner that where the Parliament intends to adopt, for purposes of Central legislation, any particular provisions of a State Law, it can do so by reference to those provisions instead of reiterating them verbatim That precisely is the case in relation to sub-section (3) of section 9. But the Madras General Sales Tax Act, 1939 was repealed and was substituted by the Madras General Sales Tax Act, 1959 The argument for the petitioner is that the Parliament cannot with propriety make a law adopting by reference, the provisions of the State law, as they stand amended by the local Legislature from time to time The principle of the contention is certainly unexceptionable, for, while it is competent for the Parliament to adopt the existing provisions of a local law as part of the Central legislation without repeating those provisions in the Central Act, it cannot make a law adopting the provisions of a local law which did not exist at the time Is this principle offended in this case ? In answering this question, we are inclined to think that we should look at the substance and not the form of the matter. Section 16 of the Madras General Sales Tax Act, 1959 substantially re-enacted, as we already mentioned,

the provisions under the Madras General Sales Tax Act, 1939, relating, to assessment of escaped turnover and the period of limitation for exercising that power.. This is not, therefore, a case where the law, as re-enacted by the local Legislature, is substantially different from what it was when the Central Legislature enacted by reference to it. The crux of the matter is that the subject-matter of section 16 of the Madras 1959 Act is not something which the Parliament had not applied its mind to when it enacted section 9 (3). On that view, we are not persuaded to hold that sub-section (3) of section 9 is unconstitutional.

The petitions are dismissed with costs one set Counsel's fees Rs. 250.

V.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE P. RAMAKRISHNAN

M.P. Govindaraj .. *Petitioner**

Madras Prohibition Act (X of 1937), section 3 (20) and Madras Denatured Spirit Methyl Alcohol and Varnish (French Polish) Rules, 1959, rules 6 (ii) and 11—French Polish—Transporting from Karaikal (Union Territory) to Bangalore under a permit—Passing through the intervening State of Madras—Conviction for transporting in Madras State—Not sustainable

Words and Phrases—"Transporting"

The case of the prosecution was that the petitioner was taking a quantity of French Polish from Karaikal under the strength of a gate pass issued by the authorities at Karaikal to Bangalore under a State permit issued by the Mysore Excise Department. He was charged with the offence of transporting under rule 6 (ii) of the Madras French Polish Rules in the intervening State of Madras

Held, the accused cannot be convicted for transporting within the meaning of rule 6 (ii) of the Rules Transport means transport from the starting point to the ultimate destination Merely passing through a place in the course of journey does not amount to transporting to that place. Many absurd situations will arise, if the act of transport is construed as involving a number of minor transports within any two points between the termini, comprising of the starting point and the destination.

Emperor v. *Dagadu Shetiba*, 39 B L R. 1062, referred.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the District Magistrate (J) at Chingleput, dated 14th July, 1964 in C A No 186 of 1964 (C C No. 1090 of 1964, on the file of the Court of the Sub-Magistrate, Kancheepuram).

P.R. Gokulakrishnan, for Petitioner.

S. R. Srinivasan, for Public Prosecutor for State.

The Cout made the following

ORDER —The facts in this case are briefly the following The petitioner Govindaraj is doing business in Karaikal He was found proceeding in a lorry MDF. 2838 near Kancheepuram and in the lorry there were 125 tins each containing four gallons of French Polish. French Polish is an item included in the Madras Denatured Spirit Methyl Alcohol and Varnish (French Polish) Rules, 1959, a series of rules framed by the Madras Government under the powers conferred under the Madras Prohibition Act. Rule 6 (ii) of the Rules provides that

"no person may possess or transport within any area in the State denatured spirit .. methyl in excess of the limits prescribed in the sub-rule (i) above except under and in accordance with the terms and conditions of a licence for possession, or a permit for transport, as the case may be"

The petitioner along with the driver was prosecuted before the Sub-Magistrate, Kancheepuram, for contravention of the above rule read with rule 11 of the said Rules The driver was acquitted and the petitioner was convicted and sentenced to pay a fine of Rs. 25. His conviction and sentence were confirmed by the District Magistrate in appeal He has filed the present revision case.

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*Crl R C.No. 1725 of 1964 (Crl.R.P. No. 1696 of 1964). 8th July, 1966.

Learned Counsel for the petitioner stressed before me that the prosecution case itself is that the petitioner was taking the aforesaid quantity of French Polish from Karaikal under the strength of Exhibit P-4, a gate pass issued by the authorities at Karaikal, to Bangalore for which State he had a permit, Exhibit P-3, issued in his favour by the Mysore Excise Depatrment It is therefore not at all in dispute, that the accused was taking this quantity of French Polish from Karaikal, an Union territory, to Mysore, another State, through the intervening State of Madras. The accused's Counsel urged that this action of the accused, will not satisfy the definition of transport, and therefore his conviction under the aforesaid rule cannot be upheld 'Transport' is defined in section 3 (20) of the Madras Prohibition Act, as meaning to move from one place to another within any local area to which that Act applies It is urged by learned Counsel that though there was movement inside the Madras State of the goods when they were found at Kancheepuram, the actual movement of the goods for the purpose of the definition of transport, must be reckoned from the starting point, that is, Karaikal to the destination, namely, in Mysore territory. It will therefore be an error, to construe the act of transport which in this case was from Karaikal to Bangalore, as consisting of an infinite series of transports from any two intervening points selected at random between the above two termini For this view, he has the support of the judgment of Sir John Beaumont, C J of the Bombay High Court in a Bench decision reported in *Emperor* v *Dagadu Shetiba*[1]. That case dealt with the definition of 'transport' given in the Bombay Abkari Act (V of 1878), which is in almost identical terms with the definition in the Madras Prohibition Act Referring to many absurd situations which will arise, if the act of transport is construed as involving a number of minor transports within any two points between the termini, comprising of the starting point, and the destination the learned Judge observed :

> " Strange results would follow if that be the construction of the Act • In my view that cannot be the meaning of the Act I think that when the Act talks about transport from one place to another it means transport from the starting point to the ultimate destination It is a question of fact for the Court to determine what the destination may be . But merely passing through a place in the course of a journey does not, in my judgment, amount to transporting to that place "

The learned Public Prosecutor appearing for the State referred to a decision of a single Judge of this Court, Kailasam, J in Crl.R.C Nos. 1030 and 987 of 1963 where a similar plea appears to have been urged by the accused On the facts of that case, it appeared that the accused had not established their plea that the starting point of the journey was outside the Madras State Further, the judgment and reasoning of the learned Chief Justice in *Emperor* v *Dagadu Shetiba*[1], was not also made available when that case was disposed of In the present case the prosecution itself does not deny the fact that the accused was transporting the goods from Karaikal to Mysore State and that the lorry was stopped at an isolated place, Kancheepuram, in the middle of the journey Obviously the principle laid down in the Bombay High Court decision would clearly apply to this case and I am of opinion that the accused cannot be prosecuted for transport within the meaning of rule 6 (*ii*) of the Rules mentioned above

The learned Public Prosecutor however urges that even if transport is left out, in the circumstances of the case there would be an import of the goods, from Karaikal to Madras Section 3 (7) of the Madras Prohibition Act, defines 'import' as bringing into any local area to which that Act applies from any other local area in the State of Madras to which that Act has not been extended. In the alternative he also urges that the accused should be charged for possession which also requires a licence under rule 6 (*ii*) of the Madras Denatured Spirit Methyl Alcohol and Varnish (French Polish) Rules, 1959 The word 'import' in the definition does not preclude an export after import and an export may be immediately after import So, where, as in this case, the accused has admittedly brought the goods into Madras from Karaikal no doubt with an intention, at the end of the transit through Madras

1. (1937) 39 Bom.L.R. 1062 at 1064.

State, to take them into Mysore territory, there will be an act of import, followed by export, but there is no requirement in the Act, that the import should be for consumption or sale inside the State of Madras If in a proper case, a charge has been framed for contravention of rule 5 of the Rules, which prohibits import without a licence, the argument of the Prosecutor that the accused is liable for import in any event could be usefully considered, and the accused convicted on the basis of proper proof Similarly it may also be open in such a case to bring home to the accused a charge for possession, even if a charge for transport is not made out On the basis of the charge as framed against the accused in this case, it is clear that the conviction for an offence of transport is not sustainable. Seeing that a small fine of Rs 25 has been imposed notwithstanding that a large quantity of the French Polish was involved in the transport, it is clear that both the Courts below did not take a serious view of the contravention, but convicted the accused for a technical contravention of the rule In the above circumstances I do not consider it necessary to take any further steps in the case for dealing with the accused under any other provision of law The revision case is allowed and the conviction and sentence of the accused are set aside The fine if paid will be refunded to the petitioner.

K. S ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

PRESENT :—MR M ANANTANARAYANAN, *Officiating Chief Justice* AND MR JUSTICE P RAMAKRISHNAN.

The Regional Provident Fund Commissioner, Madras .. *Appellant**

v.

K R. Subbaier Tape Factory Woriyur, Tiruchirapalli .. *Respondent.*

Employees' Provident Fund Act (XIX of 1952), sections 7-A and 19-A and Employees Provident Fund Scheme, Clauses 26 (1) and 30—Scope of—Claim for Provident fund contribution—When could arise—Employee's contribution—If could be claimed retrospectively for a pre-discovery period—Difficulties and hardship in specific cases, how resolved—Claim for penalty and administrative charges if could be claimed for the pre-discovery period

Words and Phrases—" Require " if directory or mandatory

The main purport of the Employees' Provident Fund Act, 1952 and the Scheme framed thereunder is to bring into existence a compulsory provident Fund applicable to certain industries with effect from the date when the scheme has been made applicable to them The principal duty is laid upon the employer to put the scheme into operation forthwith and to make the contribution of both the employers' and employees' share, with liberty of course to deduct the employee's share out of the wages The expresssion used in clause 26 of the Scheme is " every employee shall be entitled and required to become a member of the fund " which means that there is no choice for the employer to postpone the application of the scheme and it is obligatory on his part to implement it forthwith In view of the mandatory nature of the provision which automatically casts an obligation on the employer, there is no logic in fixing the date of notice of the Provident Fund Commissioner as the starting point for making a valid claim The delay on the part of the Commissioner in issuing a notice or the delay in investigation cannot be urged as a ground to escape liability of the employer for contribution to the fund The Provident Fund Commissioner is entitled to and the employer is bound to pay the contributions to the fund from the date on which the scheme is made applicable and the liability does not depend on the discovery made by the authorities of the department and the issue of notices Clause 26, read with Rule 30 of the Scheme enables the Commissioner to recover from the employer arrears of contribution for a back period *i e*, for the period prior to such discovery of failure to implement the scheme—pre-discovery period Cases of hardship or injustice such as cases of employees who have left the service or are dead or who have been dismissed during the pre-discovery period where the employer may not be able to recover the employee's share of the contribution, are all matters to be represented, and enquired into under section 7-A of the Act and these considerations cannot be a ground to invalidate the claim

The administrative charges recoverable under the Act is not dependent upon the time factor. They are a fixed percentage of the amount of contribution levied and are intended to meet the expenses of administration which could normally arise only subsequent to actual collection of the fund. It will also have relation to the actual amount collected Hence where the employer's share of the contribution has been recovered for a back period, he can be asked to pay the proportionate administrative charges But where the employees' share of the contribution has neither been demanded or paid no administration charges could be claimed in respect of that

*Writ Appeals Nos. 80 and 81 of 1963. 28th January, 1966.

As regards the recovery of damages for default it is no doubt true that it is not legitimate to infer a default where there has been a delay in payment or recovery of the contribution due to a *bona fide* doubt or dispute Facts have to be examined in each case to decide whether such damages are payable

The word ' required ' as used by a draftsman in Statutes or by parties in contracts can have a directory or mandatory meaning In interpreting the word Courts look into principles of justice and equity and if obvious injustice would result in giving it a mandatory effect, Courts would treat it as only directory But where the context of the Statute or rule in which the expression is used is such as to make it mandatory, there is no question of any choice in the matter

Ramanatha Iyer's Law Lexicon (M L J) cited , Case-law referred

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr Justice Jagadisan, dated 15th March, 1962 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 888 of 1959 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the Regional Provident Fund Commissioner, Madras to forbear from enforcing his Order No. D/MD/598/Regl., dated 28th April, 1957

The Advocate-General for *G Ramanujam*, Standing Counsel for the Central Government on behalf of Appellant.

K. K. Venugopal and *S. Swaminathan*, for Respondents

The Judgment of the Court was delivered by

Ramakrishnan, J—These appeals are directed respectively against the judgment of Jagadisan, J in Writ Petition No 888 of 1959 and Veeraswami, J. ,in Writ Petition No 619 of 1959, petition filed under Article 226 of the Constitution. They were heard together since common questions have arisen in them for decision.

In the first case, the petitioner firm ran a factory, from 1942, for manufacturing tapes, lampwicks, etc , with more than 50 persons in its employ At an anterior stage, the firm disputed the fact that the Employees' Provident Funds Act, 1952 (XIX of 1952 hereinafter referred to as the Act) would apply to the firm, and the questions was settled only when the Central Government passed an order on 29th September, 1958, under section 19-A of the Act holding that the Act applied This decisions was challenged by the petitioner in Writ Petition No. 888 of 1959, but Jagadisan, J., held the point against the petitioner It is now not in dispute that the Petitioner's concern is covered by the Act The Regional Provident Fund Commissioner, Madras, by an order dated 1st September, 1959, called upon the Petitioner to pay (1) the employer's share of the contribution to the provident fund from 1st November, 1952, (the date on which the Provident Fund Scheme framed under the Act became applicable to the firm) upto 30th April, 1957, the date when the Petitioner was called upon to pay the contribution by a notice ; (2) administrative charges in full, calculated on both the employees' and employer's share of the contribution to the provident fund (under clause 39 of the Provident Fund Scheme read with the notification of the Government dated 31st October, 1952, the percentage of administrative charges payable by the employer was fixed at 3 per cent. of the total employer's and employees' contribution) ; and (3) damages for default calculated at 61/4 per cent. per annum from the date on which the arrears fell due, upto the date of remittance (under section 14-B of the Act, a maximum of 25 per cent. of the amount of arrears was fixed for damages). The petitioner urged in the Writ Petition, that these claims for a back period were unsustainable, and that a careful examination of the Act and the scheme, would show that the provident fund contribution and administrative charges, cannot be levied retrospectively, because such levy would be oppressive and illegal. Jagadisan, J., following the decision of the Calcutta High Court of a single Judge, Mukherji (J) reported in *Aluminium Corporation of India, Ltd* v. *Regional Provident Fund Commissioner*[1] upheld the contentions of the petitioners and directed the issue of a writ of *mandamus* against the Regional Providen Fund Commissioner, the respondent before the learned Judge, to forbear from

1. A.I.R. 1958 Cal. 570.

making collections from the petitioner, by levy of contributions and management expenses for the period of 1st November, 1952 to 30th April, 1957 In regard to the claim for damages, the learned Judge accepted the contention of the Regional Provident Fund Commissioner, that the claim for damages had not yet been settled but was under investigation and therefore did not grant any relief in regard to it. Against this decision, the respondent before the learned Judge, the Regional Provident Fund Commissioner, has filed this appeal (Writ Appeal No 80 of 1963).

In Writ Petition No 619 of 1959, East India Industries Private, Ltd , Madras, a firm engaged in manufacturing water-proof packing paper, tarpaulins, etc , has been called upon by the Provident Fund Commissioner, to remit the arrears of employer's contribution for the period from 1st March, 1954 (the date when the Scheme framed under the Act became applicable to the factory) to 31st March, 1958, besides the administrative charges for the said period at 3 per cent on both the employees' and employer's contribution, and damages at 6¼ per cent per annum. There was an initial dispute before Veeraswami, J , as to whether the firm in question was a factory to which the Act would apply. That question was answered in the affirmative by the learned Judge, and there is now no dispute about it. The petitioner before the learned Judge at the time of the hearing, conceded the validity of the claim for the employer's share of the Provident Fund contribution, during the aforesaid back period, but disputed the claim for arrears of administrative charges, calculated on double the employer's contributions and for damages. Veeraswami, J , held that these two claims were unsustainable, and, by a writ of *certiorari*, quashed the order of the Regional Provident Fund Commissioner in regard to the two items mentioned above, and maintained the claim for the arrears of employer's contribution to the Provident Fund The learned Judge also followed the decision in *Aluminium Corporation of India, Ltd* v. *Regional Provident Fund Commissioner*[1], to which we have made reference Against this decision, the present appeal W.A. No. 81 of 1963, is filed by the Regional Provident Fund Commissioner.

It is common ground in both these cases that before the enactment of the Provident Fund Act, there was no Provident Fund Scheme in existence, in the two firms, concerned in these appeals. Clause 26 (1) of the Scheme framed under the Act provides:

"26 (1) (*a*) Every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee *shall be entitled and required* to become a member of the Fund from the beginning of the month following that in which this paragraph comes into force in such factory or other establishment, if on the date of such coming into force he has completed one year's continuous service or has actually worked for not less than 240 days during a period of twelve months or less in that factory or other establishment or in any other factory or other establishment to which the Act applies under the same employer, or partly in one and partly in the other.

(*b*) Every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee shall also *be entitled and required to* become a member of the Fund from the beginning of the month following that in which this paragraph comes into force in such factory or other establishment if, on the date of such coming into force, such employee is a subscriber to a Provident Fund maintained in respect of the factory or other establishment or in respect of any other factory or establishment to which the Act applies under the same employer .

Provided that where the Scheme applies to a factory or other establishment on the expiry or cancellation of an order of exemption under section 17 of the Act, every employee who but for the exemption would have become and continued as a member of the Fund, shall become a member of the Fund forthwith "

Clause 26 was recast by an amendment in 1959, and before that amendment, it was couched in a simpler form, providing that all employees employed in a factory, except excluded employees, shall be required to become members of the fund from the date the Scheme is applied to the factory if they have completed one year's continuous service on that date But for the purpose of discussion in the present appeals there is not much difference between the clause before the amendment and that after the amendment.

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1. A.I.R. 1958 Cal. 570.

Clause 29 states that the contributions payable by the employer under the Scheme shall be at the rate of 6¼ per cent. of the basic wages and dearness allowance payable to each employee to whom the Scheme applies. Clause 30 (1) provides that in the first instance the employer shall pay both the contribution payable by himself and also on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member Clause 30 (3) says that it shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges There follows an explanation which states that the administrative charges shall be fixed by the Central Government in consultation with the Central Board at a certain percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) and having regard to the resources of the fund for meeting its normal administrative expenses. Clause 32 gives power to the employer to recover the employee's contribution by deduction from the wages of the member The proviso to this clause says that no such deduction may be made from any wage other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable The effect of this proviso is that if the employer, fails to make a deduction of the employee's contribution from the pay paid for a particular period, he is precluded from deducting it subsequently, except in the case of an accidental mistake or a clerical error, or where the employee has given a false declaration that he was not already a member of the Fund Section 14-B of the Act states that where an employer makes default in the payment of any contribution to the fund or any payment of any charges payable under any other provisions of the Act or the Scheme, the appropriate Government may recover from the employer such damages, not exceeding 25 per cent of the amount of arrears, as it may think fit to impose These amounts are recoverable as arrears of land revenue under the provisions of the Revenue Recovery Act.

Section 19-A of the Act gives power to the Central Government to remove any difficulty which arises in giving effect to the provisions of the Act by an order passed for the purpose ' Such order will be final.

Before concluding the reference to the relevant provisions, we may also refer to section 7-A of the Act inserted by an amendment Act (XXVII of 1963). It provides that the Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, or any Regional Provident Fund Commissioner may, by order, determine the amount due from any employer under any provision of the Act or of the Scheme, and for this purpose, may conduct such inquiry as he may deem necessary Section 7-A (2) provides that the employer shall be given a reasonable opportunity of representing his case before an order determining the amount due from him is passed. Section 7-A (4) states that an order made under this section shall be final and shall not be questioned in any Court of law.

The initial question for consideration is whether clause 26 referred to above read with clause 30 would entitle the Provident Fund Commissioner, to recover from the employer, arrears of contribution for a back period or what is called in one of the decisions cited at the bar *M/s Kapurbhimbar Union* v. *The Regional Provident Fund Commissioner and another*[1], the "pre-discovery period" Section 5 (1) of the Act empowers the Central Government by notification, to frame a scheme called the Employees' Provident Fund Scheme, for the establishment of Provident Funds under the Act, and section 5 (2) indicates that a Scheme framed under sub-section (1) may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme Clause 1 of the Scheme provides that Chapters I to III shall come into force at once and the remaining provisions shall come into force on such date or dates as the Central Government may prescribe by a notification Clause 26 is found in Chapter IV and Clause 30 is found in Chapter V. It is common ground

1. I L R. (1965) 1 Punjab 321.

that the relevant date for enforcing these clauses in the Scheme, was 1st November, 1952 in W A No 80 of 1963 and 1st March, 1964 in W A. No. 81 of 1963. Jagadisan, J , held on the former case, that the pre-discovery period must be the period between 1st November, 1952 and 30th April, 1957, when the employer received a notice from the Provident Fund Inspector making a demand for the contribution The order of the Central Government under section 19-A negativing the objections of the employer was passed only on 29th September, 1958 But the back period was not reckoned from 29th September, 1958, the date of the notice was selected instead, for the purpose This question did not arise before Veeraswami, J , in the latter case, because of a concession by the employer that he was liable to pay the arrears of contribution claimed from 1st March, 1954 to 31st March, 1958

In regard to the validity of the claim for the pre-discovery period, there have been conflicting views of several Courts. One view is that from the date of the coming into force of the Scheme, clause 26 makes it obligatory for all employees who are not exempted, and who have put in 240 days of service to become members of the Fund, that thereafter, automatically the liability of the employer to pay both his contribution as well as the employees' contribution, under clause 30 will arise, and that the employer cannot plead, either delay on the part of the Provident Fund Commissioner in issuing the notice to him to make the contribution, or any delay arising out of the time taken by the Central Government to pass an order under section 19-A, for shirking this liability The other view is that if the above interpretation is given to the provisions, it will lead to unjust and oppressive consequences, and even to a state of affairs where the provisions themselves will become unworkable, and therefore retrospective operation (in the sense mentioned above) should be ruled out This latter view has been upheld in the judgment of a single Judge of the Calcutta High Court, Mukharji, J , in *Aluminium Corporation of India, Ltd* v *Regional Provident Fund Commissioner*[1], a decision which was followed by Jagadisan, J , in Writ Petition No 888 of 1959 now under appeal in W A. No 80 of 1953. We will briefly refer to the facts in the Calcutta case The firm in that case had a Provident Fund Scheme already in existence. The firm objected to the applicability of the Act, and this led to an order dated 23rd October, 1957 by the Government of India under section 19-A, which directed the firm to pay the employer's share of the contribution from 1st November, 1952 to 31st October, 1956, administrative charges on both the employer's and employees' shares, damages, and also the employees' share of the contribution from 1st November, 1956 with administrative charges thereon, leaving it to the employees to pay their share of the contribution for the former period if they so desired The learned Judge, Mukharji, J , catalogued as many as 7 objections, to the validity of the directions for payment of the demands under the various heads mentioned above for the back period He stressed in particular, that it was impossible to make the required payment, in respect of employees who had left the service, during the five years that elapsed between 1st November, 1952, and the date of the Government's Order, that such persons would have drawn the accumulations in the existing provident fund and left the employment, and that no purpose would be served by asking the employer to pay again their contributions to a Provident Fund Equally it would be impossible to apply clause 32 of the Scheme for recovering the employees' contribution, from such persons who had left the employment The retrospective application of several other provisions of the scheme relating to the contribution cards and the submission of returns would be quite impossible The claim for the employer's share of the administrative charges would be clearly illegal and inconsistent with the Act, because the administrative charges were intended to meet the cost of administering the fund, and for five years restrospectively there was no fund, and therefore no cost of administration incurred therefor. Coming to the damages, the learned Judge observed, that at earlier stages the Government had told the employer that the Act did not apply, that only after 23rd October, 1957, was the difficulty whether the establishment was a factory or not removed, and that consequently there could

1. A I R. 1958 Cal 570

be difficulty in the payment of contributions prior to that date. Similar reasons were relied on by Jagadisan, J., for holding that the retrospective operation of the Act and the Scheme, would be not merely illogical and oppressive, but inconsistent with the terms of the enactment which were manifestly prospective in their operation. He pointed out that there was no duty laid on the Court to yield to absurd construction of statutes and referred to the views of Maxwell "An argument drawn from inconvenience it has been said, is forcible in law; and no less, but rather more force is due to any drawn from an absurdity or injustice' (Maxwell, Interpretation of Statutes, 11th edition, page 183).

It appears to us, on the other hand, with due respect to the learned Judges that there is considerable force in the contrary view which holds that the main purport of the Act and the Scheme framed thereunder is to bring into existence a compulsory provident fund applicable to all industries to which the Act applies, with effect from the date when the Scheme has been declared applicable to them. The principal duty is laid upon the employer to put the Scheme into operation forthwith, and to make the contributions of both the employer's and employee's share to the fund then and there, and deduct the latter share from the salary of the employees for the purpose of adjusting it against the amount, which they had paid to the fund in advance. In clause 26 of the Scheme extracted earlier, the words used are "every employee shall be *entitled* and *required* to become a member of the Fund." In the context of the Act, the word "entitled" means that the employee has got an absolute right to get the benefits of the Act. The word "required" implies an obligation on the employer to treat all the employees, who are qualified and who are not exempted, as members of the fund, and to pay the contribution to the fund (both the employer's and the employees') from the date of the coming into force of the Scheme without allowing any interval to lapse either for the awaiting of a notice of demand from the Provident Fund Commissioner or for clearing a point of doubt or difficulty by getting an order from the Central Government under section 19-A.

The word "required" as used by legal draftsmen in statutory enactments, or by parties to formal contracts, has come in repeatedly for judicial interpretation. A reference to any well known text book dealing with the meaning of words and phrases in judicial usage, will show the wide range and variety of the meaning of the word. Referring to the Law Lexicon of British India by Ramanatha Ayyar, the word required has the meaning of "to take necessary; to demand, to ask as of right"; to claim, to render necessary as a duty", etc. In the Shorter Oxford Dictionary, one use of the word is referred to in the following terms:

"Oliver Cromwell required, both of the Soldiers and others the Oath of Fidelity".

Obviously Oliver Cromwell, after supplanting the Royalist regime, would not have given an opportunity to his soldiers of making a choice in the matter of allegiance. It is clear that "require" in the above usage, meant a mandate or a command. In contractual obligations the word has been given the meaning of need. In some cases the Courts had looked to principles of justice and equity for giving the word a directory rather than a mandatory import. In *Cole* v. *Greene*[1] Tindal, C.J., has followed an earlier decision in *The King* v. *Birmingham*[2], for giving preference to the directory meaning of the word, in interpreting a provision in the Marriage Act, that the consent of the father or guardian *is required* for the marriage of a minor. It was held by Lord Tenterden in *The King* v. *Birmingham*[2], that the absence of such consent would not make the marriage void if solemnized without consent, and hence the word (require) must be interpreted to take a directory significance. But on the other hand, in *Queen* v. *The Justices of Worcestershire*[3], the Court of Appeal in England had to apply section 29 of the Alehouse Act, 1828, which required the Court of Quarter Sessions in every case where a notice of appeal against the judgment of any justice in or concerning the execution of the Act shall have been dismissed, to adjudge and order the appellant

1. (1844), L.J.R. page 30.
2. 7 B. & C. 29; S.C. 6 Law.J. Rep. M.C. 67.
3. L.R. (1900) 2 Q.B. 576.

to pay to the justices to whom such notice of appeal shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall in the opinion of the Court of Quarter Sessions be sufficient to indemnify the justice from all cost and charge whatsoever to which he may have been put in consequence of his, having had notice of appeal served upon him. A L. Smith, L J expressing the view of the Court, observed that the section made it imperative on the Court of Quarter Sessions, upon the event therein specified happening, namely, the dismissal of the appeal, to adjudge, and order the appellant to pay to the justice the indemnity costs therein mentioned. Bose, J., in *K. S. Srinivasan* v. *Union of India*[1], while interpreting a rule, which ran :

> " Where recruitment to a specified post is *required* to be made in consultation with the Federal Public Service Commission, no such declaration shall be issued except after consultation with the Commission."

Held that the word " required " should be given only a directory and not a mandatory meaning, because an obvious injustice would result otherwise. In view of the obligatory nature of the provisions of the Provident Fund Act and the Scheme framed thereunder, giving no choice to the employer to postpone the application of its provisions, it appears to us that the word " required " in clause 26 of the Scheme, has to be given a mandatory and not a directory meaning, and that it implies an obligation whose effect is that every employee who is not exempted, and who satisfies the required qualification of service, automatically becomes a member of the fund from the date of the coming into force of the scheme Nor does the argument of hardship, or injustice on which stress was laid by Mukharji, J , as well as Jagadisan, J , can have such substance, subsequent to the amendment which incorporated section 7-A into the Act in 1963. That section gives an opportunity to the employer to press his objections before the authorities mentioned therein, to any claim for payment made against him, and this will include the ground that it is oppressive or unjust in nature After this amendment, the authority is now obliged to decide the matter judicially after giving the employer a proper hearing. In our opinion, it is in the course of such an enquiry that individual cases of hardship should be pleaded, and relief obtained, for example, regarding employees who have left the service during the pre-discovery period, employees who have been dismissed, employees who are dead, and employees in whose cases the employer did not have an adequate opportunity to recover their contributions if necessary even for reasons other than those mentioned specifically in the proviso to clause 30 ; it will be also open to the employer to press at such an enquiry, for the waiver of the employees' share of the contribution for the pre-discovery period (a relief which the respondent has already given to the petitioners in these cases), or even for a period anterior to the order under section 19-A of the Act, in a proper case. In fact, if we view the problems, in the abstract, there is no logical reason why, if the claim for the period anterior to the notice is held to be oppressive, it could not be extended, in a proper case, to the period anterior to the order under section 19-A. A decision cited before us, of Rajagopalan, J., in *Annamalai Mudaliar & Bros.* v. *R. P F Commissioner*[2], lays down that the provisions of the Act should not be applied to a factory in the event of a dispute, till a decision under section 19-A is given to settle the dispute But this decision is not authority for the view that if and when the decision given, under section 19-A is in favour of the department a demand for contribution made thereafter for the back period cannot be legally enforced. If there is a rule which casts automatically upon the employer, as the Act does, the obligation to make the contribution, there is no logic in fixing the date of the notice by the Provident Fund Commissioner as the starting point, for making a valid claim On the other hand, the Provident Fund Commissioner might have had more than one reason for the delay in the issue of notice He might not have an adequate staff to make a speedy investigation in respect of every factory in his jurisdiction or the investigation might have taken a long time In such circumstances an indifferent or recalcitrant employer who deliberately ignores the pro-

1. 1958 S.C.J. 777 ; A.I.R. 1958 S.C. 419 at 433. 2. (1955) 1 M.L.J. 674.

visions of the Act, cannot urge, that he was awaiting the issue of a notice from the Provident Fund Commissioner, for the purpose of implementing the Act and the Scheme in his establishment, and should therefore be given relief for the period prior to the issue of the notice.

There is a considerable volume of authority in support of the view which we have just now stated Srinivasan, J , in W P No 205 of 1962 held that the Act takes effect at once and the provisions of the Act become enforceable against the employer of a factory or an establishment with effect from the date on which the relevant clause of the Scheme comes into force, and that it does not depend upon the discovery made by the authorities of the department and the issue of the notice calling upon the employer to make the contributions according to the Act. A Division Bench of the Punjab High Court in *Kapurbhimbar Union* v *The Regional Provident Fund Commissioner and another*[1], a division Bench of the Andhra Pradesh High Court in *Nazeena Traders (P), Ltd* v *The Regional Provident Fund Commissioner*[2], (Chandra Reddy, C J , and Chandrasekhara Sastry, J) a Full Bench of the Kerala High Court in *Kokkalai R. & O M Foundry* v *R P F. Commissioner*[3], (where on facts the Provident Fund Commissioner had given a notice even before 1st November, 1952) and the Allahabad High Court in *N K Industries (P), Ltd* v *R P F. Commissioner,* U P.[4], (followed in the above Kerala High Court Full Bench decision) have all held the view which we adopt in this case for the reasons stated above.

There is one other decision of the Bombay High Court in *Nagpur Glass Works* v *R.P. F Commissioner*[5], by Mudholkar and Naik, JJ , who had to consider clause 27 of the Scheme, and they held that it was mandatory While referring to clause 26 of the Scheme they made a passing observation that the word " require " used in that clause, could be distinguished from the words " shall become " in clause 27 and that the former would not have a mandatory effect But there has been no discussion in that judgment of the significance of the word, " require " in the context of the Act and the Scheme, by reference to authorities

We may also refer to the Supreme Court's decision in *Orissa Cement* v *Union of India*[6], where they struck down a provision in the Scheme which made it obligatory to pay the employees' contribution for employees under contractors, as there was no provision in the Scheme (as it then stood) for the employer to recover from the contractor such contributions The Supreme Court held that the provision operated unfairly and harshly on persons who employed contract labour and was also discriminatory, thereby contravening Article 19 (6) of the Constitution of India But here the facts are different We have already referred to the fact that if any hardship results, it may also be due to the employer's indifference or recalcitrancy, and that in genuine cases of hardships he has a remedy for relief under section 7-A of the Act.

In regard to the question of administrative charges, following Mukharji, J.'s view, Veeraswami, J held that it could not be recovered because during the pre-discovery period there was no fund to administer, and therefore the demand for administrative charges was improper But this argument overlooks one important point. The administrative charges are not based upon the time factor, in the sense of being calculated at so much per year They are fixed at a percentage of the amount of the contribution levied and are therefore intended to meet the expenditure involved in investment the keeping of accounts and so on which can all arise only subsequent to the actual collection of the fund and will also have reference to the amount actually collected. From this point of view the claim for administrative charges calculated as a percentage on the amount which the employer has been asked to pay by way of contribution for the back period is clearly admissible though it might not be admissible in respect of employees' contribution, when it has neither been demanded nor paid

1 I L R (1965) 1 Punj 321
2 (1965) 2 An W R 326 : A I R. 1965 Andh. Pra. 200.
3. A.I R. 1961 Ker. 57.
4. A I R 1958 All 474
5 A I R 1961 Bom 156
6. (1963) 2 S C J. 402 . (1962) I L.L.J 400.

As regards the third item, damages for default, it is clear that the damages cannot be claimed in the absence of proof of default Mukharji, J., in *Aluminium Corporation of India Ltd* v. *Regional Provident fund Commissioner*[1] has observed :

"The question of liability for damages of the employer only arises when the employer makes default, I do not think that on the facts of this case the employer can be said to have committed a default The employer wrote to the Government. The Government writes back in answer that the Act will not apply. . . An employer cannot make a default when there is a difficulty or doubt and when the Central Government has to remove that difficulty or doubt by an express order. It is only from the date of the order removing such difficulty or doubt that the default can operate In other words, there can be no retrospective or constructive default in the present context of facts and law."

What transpires from the above, is that it will not be legitimate to infer a default, merely because there was no payment by the employer of the contribution during the pre-discovery period. Each case must be examined carefully with respect to its own facts, for an inference about the default Section 7-A of the Act has provided for such an examination in disputed cases The amendment introducing section 7-A came after the passing of the present orders now in appeal. Therefore, we will remit the claim for damages to a fresh consideration by the appropriate authority under section 7-A of the Act. Likewise, other difficulties in the enforcement of the demand, for example, claims in respect of persons who have left the employment or persons who have died or whose whereabouts are not known and persons who have been dismissed, should all be the subject-matter of a detailed claim and consideration by the authority under section 7-A on application made to it for that purpose, and a fresh opportunity will have to be given to the petitioner for obtaining such a relief, in view of the enactment of section 7-A after the orders now in disputes had been passed

We will finally deal with the argument of Sri K K. Venugopal appearing for the respondent in Writ Appeal No 80 of 1963 that the present proceedings involved a violation of Article 19 (1) (*b*) of the Constitution of India which deals with the right to acquire, hold and dispose of properties. But he has not referred to any particular rule or provision which offends the aforesaid provision of the Constitution Learned counsel urged that under the provisions of the Scheme as they stand, an employer would be liable to be prosecuted for any omission to file a return or any other contravention of the Scheme which has occurred during the back period at a time when he had no opportunity or occasion to submit the return or maintain a register and the like The short answer to this argument is that it will be open to the petitioner to put forward such a defence where a question of prosecution arises, but that it not the case here. Another argument of the learned Counsel is based upon the argument which was accepted by the Supreme Court in the case of contributions for contractor's employees in the decision cited above. But the circumstances were quite different in the case before the Supreme Court The Scheme, as it stood, at that time, gave no opportunity to the employer to recover contributions in respect of employees under a contractor. But the scheme does give the employer an opportunity to recover contributions of the employees employed under him (which is the case here) subject to the restrictions mentioned in clause 32. He did not of course, have that opportunity, in the case, of contribution demanded for the pre-discovery period, but that will be a matter for which relief will have to be claimed, on proper grounds, in an application under section 7-A of the Act There are therefore no grounds for inferring a discriminatory operation of the provisions of the Act.

We therefore, allow the appeals in part as indicated in the foregoing paragraphs. In the case of Writ Appeal No. 80 of 1963 the order of Jagadisan, J., issuing a writ of *mandamus* will be set aside, but with the observation that it will be open to the petitioner to urge a claim for necessary reliefs, including claims in respect of damages, and also in respect of contribution relating to individuals, like those who have left the employment, and so on, during the period 1st November, 1952, to 30th April, 1957, in an application to be filed before the appropriate authority under

1. A.I.R. 1958 Cal. 570.

section 7-A. In the case of Writ Appeal No 81 of 1963 while allowing the appeal from the decision of Veeraswami, J , we also make a similar observation. No costs.

R.M. ——— *Appeals allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE T. VENKATADRI.

Bathool Bai .. *Petitioner**

v.

A. S Vaidyanathan .. *Respondent.*

Madras Buildings Lease and Rent Control Act (XVIII of 1960), section 10 (3) (a)—Bona fide *requirement under—What is—Building residential or non-residential—Test*

Apart from cases of gross unreasonableness on the part of a landlord, if it is established that there is a genuine present need of the house for the landlord's own occupation, the Court cannot presume *mala fides* because of factors such as the landlord's having other houses or his or her being a single soul or that he or she is not permanently living in the city or town concerned, The fact that the landlord is living in a rented house would be enough to satisfy the Court about the *bona fides* of the requirement.

Abdul Kareem v *C. M. Mohamed*, (1962) 1 M L J 382, referred

If the main or substantial purpose of the letting is for residence the mere fact that the tenant (a doctor) was using a part of the premises for his business of running a pharmacy will not disentitle the landlord from applying for possession of the building for her own resident

Petition under section 25 (1) (*a*) (ii) of Act XVIII of 1960 praying the High Court to revise the Order of the Court of Small Causes at Madras dated 28th October, 1964, and made in H R A No 23 of 1964 (H R C. No. 4613 of 1962, House Rent Controller, Madras)

S. Jayakumar and *K Chandrasekharan*, for Petitioner.

V. Srinivasan and *K. Appadorai*, for Respondent.

The Court delivered the following

JUDGMENT :—This revision petition is preferred by the landlady whose application for eviction of the respondent-tenant on the ground that she required the premises *bona fide* for her own occupation was dismissed by the appellate authority.

The landlady let out the suit premises to the respondent on a monthly rent of Rs 80 from 1941. It is common ground that the respondent is a doctor by profession and is also incidentally carrying on business in a portion of the premises known as Scientific Pharmacy It is also common ground that the premises was let out to the respondent only for residential purposes The landlady has been attempting for some years to get possession of the premises by filing applications for eviction of the tenant but she has not been successful. The landlady was originally living in a rented premises in Royapettah. As her only daughter was at Bombay she vacated the rented premises and went to Bombay in order to undergo a major surgical operation in Bombay. She returned to Madras in 1959 and was temporarily staying with a relation of hers The old complaint again reappeared and she again went to Bombay for further treatment and finally returned to Madras in the month of January, 1962 It is true that she has another house which is bigger one in Triplicane That being very spacious and she being alone she does not want to occupy that premises Further she wants to live in the place where her community people live. In those coircumstances, she filed the present application, out of which this revision arises, for eviction of the tenant on the ground that she required the premises *bona fide* for her own occupation The learned Rent Controller found that the requirement of the landlady was *bona fide* and ordered eviction. But on appeal, this finding was reversed, and the application was dismissed It is again this order of dismissal of her application, the landlady has filed the revision petition.

The short question that arises for consideration in this revision petition is whether the application of the landlady is a *bona fide* one.

*C.R.P. No. 652 of 1965. 28th January, 1966.

The word '*bona fide*' has been the subject of judicial interpretation. While construing the word '*bona fide*' in the Act, it must be borne in mind that it is the duty of the Court to see that the premises are required both reasonably and *bona fide*. *Bona fides* may be proved in an ordinary way like any other fact in issue or a relevant fact. There is no such rule of law that '*bona fides*', being a subjective matter, can only be proved by the landlord stepping into the witness box In *Basantlal* v. *Chakravarty*[1], the Calcutta High Court has occasion to deal with the connotation of the word '*bona fide* requirement' of the landlord It was observed that gross unreasonableness of the landlord might, in proper circumstances, lead the Court to the conclusion that the landlord's requirement was not *bona fides*, and that how much unreasonableness would be regarded by the Court as evidence of *mala fides* of the landlord would depend on the facts and circumstances of the case. The requirement of the landlord must be judged as at the date of hearing In *Harcoute* v. *Lowe*[2], Lush, J., observed that the only time which it was necessary to consider in order to apply the provisions of the section was the time when the Court was asked to make the order The landlord must have a genuine present need for the house for his occupation The term 'require' implies that it is more under the force of his personal circumstances than under the impulse of a desire that the landlord needs the premises; but the desire in not altogether to be ruled out. Somervell L J, in *Burman* v *Woods*[3], held that the altered circumstances must be taken into consideration in moulding the final decree or order The fact that the landlady has an accommodation elsewhere is no reason for holding that the landlady does not reasonably require the premises. Bearing the principles laid down in the cases cited, I have to consider whether the application of the landlady is a *bona fide* one or not It cannot be denied that the landlady is now living in a rented house. It has been held by Ramachandra Iyer, Officiating Chief Justice, in a recent decision reported in *Abdul Kareem* v. *C M Mohamed*[4], that, when a landlord or landlady lives in a rented premises, it would be enough to satisfy the Court in an application for eviction of the tenant that it is a *bona fide* requirement of the landlord or landlady.

The only contention of the respondent is that he is in occupation of the premises for more than 15 years. He has been using the premises both for residential and non-residential purposes and therefore the landlady cannot seek eviction on the ground of own occupation He has also contended that the landlady has been aware that he has been carrying on business under the name and style of Scientific Pharmacy, and that therefore the landlady cannot come with an application for eviction on the ground of her own occupation.

There is no dispute that the premises was originally let out for residential purposes. A Full Bench of this Court in *Dakshina Moorthy* v. *Thulja Bai*[5], have laid down the following considerations for deciding the question whether a building is residential or non-residential:

> "(1) Where there is an instrument of tenancy specifically and explicitly declaring the purpose of letting as residential or non-residential, no difficulty generally arises (2) Where there is no such instrument of tenancy, the question will have to be considered on the basis of direct evidence *aliunde* concerning the purpose of the letting, which may be adduced in a case (3) If no such evidence too is forthcoming, the Court can only look at the evidence concerning the user of the premises by the tenant down to the date of the application for eviction, as acquiesced in by the landlord For, such user and such acquiescence afford a safe basis for an inference of agreement between the parties as to the purpose of the letting (4) where there is evidence of such user, but there is no evidence of such acquiescence, the structual design, the antecedent user of the building by the landlord as known to the tenant and other surrounding circumstances, if any will also have to enter into the determination of the question whether the building is or is not residential (5) Difficulty may sometimes still remain, *i.e.*, even, after applying the tests above indicated, if the building is found let for both kinds of purposes residential and non-residential, no distinction being made between one part as let for one purpose and the other for the other purpose In such a case what has to be determined as a question of fact is, what was the real, main and substantial purpose of the letting?"

Now in the instant case, originally, the premises was let out for residential purposes to the tenant who is a doctor by profession. Being a doctor, incidentally, he has

1. (1949-50) 54 C W N. 20 at 24.
2. 35 T.L.R 255.
3. L.R. (1948) 1 K.B. 111.
4. (1962) 1 M L J. 382.
5. (1952) 1 M.L.J. 390.

been carrying on business known as Scientific Pharmacy in a small portion of the building. The real, main and substantial purpose of the letting was for residential purposes. Therefore conversion of a portion of the house for a business would not certainly alter the residential character of the building. No doubt, learned Counsel for the respondent-tenant cited the decision in *Dr Gopal Das Varma* v *Dr Bhardwaj*[1], where a landlord filed an application for eviction of the tenant on the ground that he required the premises for his own occupation. The tenant contended that the landlord did not require the premises *bona fide* for his personal use and that he was using the major part of premises for carrying on his medical profession Both the appellate authority and the High Court found that the tenant was using the building both for his residence and his professional work since the inception of the tenancy without any objection from the landlord and that the *bona fide* requirement of landlord was not proved Here the landlady has at no time given her consent to convert a small portion of the building for non residential purposes. The tenant is no doubt a doctor and he will be carrying on his professional activities, but that does not mean that the building has become non-residential in character, so as to prevent the landlady from applying for eviction on the ground of her *bona fide* requirement. The evidence of the tenant is very meagre, slender and weak in character. All that he says is that he is an allopathic practitioner, residing there and running his pharmacy. He does not say what is the extent of the residential portion and non-residential portion and whether the landlady has acquiesced in his running of the pharmacy from the beginning or at least subsequently On the other hand, the agent of the landlady has categorically stated that the doctor was let in as a tenant only for residential purposes, and that he is running the pharmacy without the landlady's consent. In such circumstances, I fail to see how the principles laid down in the Supreme Court decision would apply to the facts of the present case. She has further given sufficient reasons why she required this building for her occupation. Under these circumstances, I feel that the requirement of the landlady is a *bona fid*, one. The reasoning of the appellate authority that the landlady is a single soul, not permanently residing at Madras and is having other houses is not convincing to me. One cannot expect her to live in her daughter's house at Bombay. Further, she, being a single soul, wants to lie in a smaller house and amidst her community people. I therefore find that the reasoning of the appellate authority is not consistent with the provisions of the Act and the rulings of our High Court.

In the result, the revision petition is allowed. The parties will bear their own costs throughout.

However as the tenant has been living in the premises for more than 15 years he may not find it possible to find alternative accommodation immediately It is therefore just and equitable that sufficient time should be given to him to find alternative accommodation, and I give him time till 31st July, 1966. The tenant will hand over vacant possession on or before that date.

R M. *Petition allowed.*

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1. (1961) 2 S.C.J. 616.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR JUSTICE P S KAILASAM

P B. K Raja Chidambaram .. *Petitioner**

v.

R P Rathna Sarma and others . *Respondents*

Madras Co-operative Societies Act (LIII of 1961), *Sections* 73 (1), *Proviso and* 97 *and Madras Co-operative Societies Rules,* 1963, *sections* 73 (1) *Proviso,* 97 *and Rule* 29—*Election—Nomination of a candidate—If could be rejected on the ground that the candidate has seconded the nomination of another candidate—Right of a person whose nomination has been rejected to seek redress by* certiorari—*If could be done only after the completion of the election—Candidate—If could seek only the remedy of arbitration—Election—If touches the business of a society*

Constitution of India (1950), *Article* 226—*Writ of* certiorari—*Election to Co-operative Society under the Co-operative Societies Act—Rejection of nomination—Interference by court before election.*

It is no doubt true that a dispute relating to the validity of nomination of a candidate for election to the Board of Directors of a Co-operative Society is a dispute touching the business of the society within the meaning of section 73 of the Act and could be decided by Arbitration under the Act But the proviso to sub-section (1) of the section, provides that such a dispute could be raised only after the declaration of the result of the election Hence a person whose nomination has been rejected cannot approach the Registrar under section 73 of the Act before the election Such a dispute cannot also be referred to the Registrar under section 97 of the Act as the scrutiny and rejection of a nomination by the scrutiny committee cannot be an act of an officer subordinate to him within the scope of that section Nor could the powers of the State Government aunder section 120 of the Act be invoked in such cases Hence a person who alleges that his nomination has been rejected illegally will be well within his rights in invoking the power of the High Court under Article 226 of the Constitution of India, even before the election is completed

In the absence of any specific provision in the Co-operative Societies Act or the Rules or any bye-law made by a society, the nomination of a candidate cannot be rejected merely because the candidate has seconded the nomination of another candidate

The power of the High Court to interfere under Article 226 of the Constitution against an order of rejection of a nomination before the declaration of the results of the election has not been taken away under the Madras Co-operative Societies Act, as in the case of elections under the Representation of the Peoples' Act Without the power of the High Court under Article 226 of the Constitution being taken away by competent authority, it cannot be said that the Court has no power. Hence where a nomination paper has been rejected without jurisdiction and in the face of it unsupportable in law and the aggrieved party has no other remedy, the High Court will not hesitate to exercise the powers conferred on it under the Constitution

Lakshmiah v *Sri Perumbudur Taluk Co-operative Marketing Society Ltd*, (1961) 2 M L J. 279 (held not good law after the new Act of 1961).

Case-law referred and discussed

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records connected with the proceedings of the scrutiny committee for the election of a Director to the Tiruchirappalli District Central Co-operative Bank, dated 4th November, 1965, and quash the same as illegal and without jurisdiction.

T. R Srinivasan, for Petitioner.

S Rajagopalan, for Respondents 1 to 6.

P. R Gokulakrishnan, for 7th Respondent.

The Court made the following

ORDER :—This petition is filed praying for the issue of a writ of *certiorari* calling for the records connected with the proceedings of the Scrutiny Committee for the election of a Director to the Tiruchirappalli District Co-operative Central Bank Limited, dated 4th November, 1965, and for quashing the same as illegal and without jurisdiction.

The Tiruchirappalli District Co-operative Central Bank consists of 19 Directors. Out of the 19 Directors, 17 had already been elected. One Director has to be

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*W.P. No. 4415 of 1965. 17th February, 1966.

elected from the Lalgudi Co-operative Supervising Union and another from individuals holding fixed deposits The business year of the Bank begins from 1st January and ends by the 31st December The term of office of elected members is three years, but it is provided that one-third number of members elected to the Board, at the first election shall retire at the end of the first year after such election and another one third number of members to retire in the second year The members that are to retire are to be determined by lots cast by the Board. As a result of lots cast, the petitioner's term as a Director of the Bank expired on 31st December, 1965 The petitioner wanted to be elected to the District Co-operative Central Bank from the Lalgudi Co-operative Supervising Union

On 3rd November, 1965, the petitioner filed his nomination for election to the Central Bank. When the nominations were taken up for scrutiny by the Scrutinising Committee consisting of the first respondent, President of the Supervising Union, and respondents 2 to 5 the members of the Committee, an objection was raised to the nomination of the petitioner on the ground that he had seconded the nomination of the sixth respondent This objection was upheld by respondents 1 to 5, and the nomination of the petitioner was rejected

The petitioner questioned the correctness of the rejection of his nomination on the ground that he did not second the nomination of the sixth respondent for election to the Central Bank, but only for election to the governing body of the Union and that fraud was played upon him by changing the name in the nomination paper. This plea of the petitioner was rejected by the Scrutinising Committee As this finding by the Scrutinising Committee is one of fact, it was rightly not raised before this Court.

The only contention raised in this Court was that even if the petitioner is found to have seconded the nomination of the sixth respondent for election to the Central Bank, that would not invalidate his nomination, as there is no prohibition against a candidate nominating another. The procedure as to elections is elaborately laid down in the Madras Co-operative Societies Rules, 1963. Rule 29, clause (5) relates to nomination of a candidate for election. It requires that the nomination should be made in Form No 3 which will be supplied to any member free of cost on application. Form No. 3 requires the name of the society, admission number and name of the candidate, father's name, and his address The admission number and name of the seconder are also to be given. Every nomination paper shall be signed by two members whose names are included in the list The nomination papers should be presented in person to the president of the society before the date and hour specified After receipt of the nomination paper, the person who receives it shall enter in the nomination paper the serial number and certify the date and hour at which the nomination paper was received by him and acknowledge receipt of the nomination paper. Rule 29, clause (6) relates to scrutiny and it enables the committee to examine the nomination papers and decide all objections which may be made at the time to any nomination and either on such objection or on its own motion after such summary enquiry if any, as the committee thinks necessary, reject any nominations for valid reasons. The committee is also required to record in writing a brief statement of its reasons for its rejection Apart from the requirements under rule 29 (5), a candidate shall be ineligible for being elected or appointed as a member of the committee if he suffers from any of the disqualifications mentioned in section 28 of Act LIII of 1961. Neither the Co-operative Societies Act nor the rules framed under it or the bye-laws of the Central Bank expressly state that the nomination of a candidate who has seconded the candidature of another shall be disqualified and his nomination rejected. In the absence of any specific rule, the disqualification and the rejection of the nomination on this ground is beyond the powers of the Scrutinising Committee.

It was next contended on behalf of the respondents that even if the nomination of the petitioner was erroneously rejected, the petitioner has other remedies and a relief by way of a writ of *certiorari* is not available to him.

Section 73 of the Madras Co-operative Societies Act, 1961, provides that if any dispute arises touching the constitution of the committee, such dispute shall be

referred to the Registrar for decision. It has been held that the election of an officer is certainly a part of the business of the society A full Bench of this Court in *Madhava Rao* v. *Surya Rao*[1], laid down that the validity of a nomination of a candidate for election to the Board of Directors of a registered society is a dispute " touching the business" of the society within the meaning of section 51, which corresponds to present section 73 of the Madras Co-operative Societies Act, 1961. It has also been held by the Supreme Court in *Ponnuswami* v. *Returning Officer*[2], and followed by this Court in *Muthuvelappa Gounder* v. *Deputy Registrar of Co-operative Societies*[3], that the word ' election ' means the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process. The view expressed in *Muthuvelappa Gounder* v *Deputy Registrar of Co-operative Societies*[3] is that the whole process of election commenced from the state of nomination, and the word " election " as including nomination also in its wide sense of the term On the authority of the decisions cited above, there can be no doubt that the rejection of a nomination paper is a dispute touching the constitution of the committee under section 73 But the proviso to clause (1) of section 73 excludes any dispute relating to or in connection with the election to a committee being referred to the Registrar under this sub-section till the date of the declaration of the result of such election. The only remedy of the person whose nomination is rejected is to approach the Registrar under section 73 after the date of the declaration, his remedy before that date having been barred by the proviso to section 73 Clause (6) of section 73 provides that the Registrar may pass such interlocutory orders as he may deem fit in the interests of justice. The power to pass interlocutory orders will only be available in disputes which can be referred to him under section 73, that is, election disputes after the date of the declaration of the results of such elections As an election dispute before the date of declaration of results cannot be referred to him under section 73, he will not have any power to pass any order in an election dispute regarding the rejection of a nomination before the declaration of the election results. It was contended that even if the dispute cannot be referred to the Registrar, an application can be made to him under section 97 for examining the record of any officer subordinate to him and revising the order It was submitted that the power of revision is available in cases not covered under section 96 Section 96 (1) provides for an appeal to the Tribunal against the order of the Registrar under sub-sections (2), (3) and (4) of section 73, and if no appeal was available under section 96, the dispute not being one referable under section 73, an application under section 97 was maintainable Section 97 empowers the Registrar to call for and examine the record of any officer subordinate to him An ' officer ', as defined in section 2 (8) includes a member of Committee and any other person empowered under the rules or the by-laws to give directions in regard to the business of the society. A ' committee ' is defined as meaning the governing body of a registered society. The scrutiny committee is not the governing body of the registered society and therefore its members are not members of a committee as required by the definition Though the scrutiny committee is empowered to scrutinise the nominations and accept or reject them, it cannot be stated that they have any power to give directions in regard to the business of the society. The scrutiny of the nomination would not amount to a direction regarding to the business of the society. The powers of the registrar to entertain any dispute in connection with the election of a candidate before the date of declaration of the results is specifically prohibited under the proviso to section 73. It will not be logical to read into section 97 an intention to empower the Registrar to go into a dispute relating to rejection of nomination before the date of declaration under section 97 by way of a revision unless there are express provisions to that effect. I am unable to agree with the contention that under section 97 the Registrar, though prohibited from entertaining an appeal, could entertain a revision against the order rejecting a nomination pending declaration of the results. Reference was made to section 120 and it was submitted that the Government could direct the Registrar to make an enquiry into the rejection of the nomination paper of the peti-

1. (1953) 2 M L.J. 340 · I.L R. 1954 Mad. 1047.
2. 1952 S.C.J. 100: (1952) 1 M L.J. 775: 1952 S C R 218.
3. (1960) 2 M.L.J. 392.

tioner Section 120 is intended to enable the Government to direct the Registrar to make an enquiry or to take appropriate proceedings under the Act in any case specified in their order Section 120 cannot be availed of by the petitioner to approach the Government for relief A consideration of the various sections makes it clear that though the dispute relating to the rejection of a nomination can be referred to the Registrar it can only be done after the declaration of the results and the petitioner has no remedy to question the correctness of the invalidation of the nomination before the declaration of the results The petitioner is also not entitled to prefer an application for revision under section 97 to the Registrar or to the Government under section 120.

Learned Counsel for the respondent contended that the intention of the Legislature was not to provide any remedy against the order of rejection of the nomination until the results were declared, the purpose being to avoid unnecessary prolongation of the process of election Strong reliance was placed on the decision of the Supreme Court in *Ponnuswami* v. *Returning Officer, Namakkal*[1]. It was held by the Supreme Court that the High Court has no jurisdiction under Article 226 of the Constitution to entertain petitions regarding improper rejection by the Returning Officer of nomination papers of candidates for election either to the House of Parliament or to the State Assembly and the jurisdiction of the High Court under Article 226 has been excluded in regard to matters provided for in Article 329 which covers all 'electoral matters' The Court expressed the view that Article 329 (*b*) was enacted to prescribe the manner in which and the stage at which this ground and other grounds which may be raised under the law to call the election in question, could be urged Article 329 (*b*) of the Constitution prohibits the questioning of election to the Houses of Parliament and Legislatures of the State except by any election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. The Representation of People's Act, 1951, was enacted in pursuance of the powers conferred under Article 329 of the Constitution, and the provisions of the Act, particularly sections 80, 100, 105 and 170 make it clear that no petition regarding election could be entertained before the declaration of the results of the election. Learned Counsel for the respondent submitted that a reading of the Madras Co-operative Societies Act and the rules framed thereunder would show that interfeence before the stage of declaration of the results was not intended But it has to be noted that the power of the High Court to interfere under Article 226 against the order of rejection of the nomination before the declaration of the results has not been specifically taken away under the Madras Co-operative Societies Act as in the case of elections to the Houses of Parliament and Legislature by Article 329 (*b*) of the Constitution and the Representation of People's Act. Without the power of the High Court under Article 226 of the Constitution being taken away by competent authority, the contention that the High Court has no power to interfere cannot be accepted as sound While admitting that the High Court's power to interfere in this case has not been taken away, it was argued that interference at this stage would have the effect of regarding the process of election and would be contrary to the spirit of the enactment In support of this plea, learned Counsel relied on a decision of the Madhya Pradesh High Court reported in *Thakur Prasad* v *V. S Mehta*[2]. Dixit, C J, to whom the question was referred to on a difference of opinion, was of the view that the High Court's decision in *Ponnuswami* v *Returning Officer, Namakkal*[1], was directly in point and held that the Madhya Pradesh Panchayats Act (VII of 1962) and the rules framed thereunder intended to give a sort of finality to different stages of election and to provide that all matters arising during the election shall be determined and adjudicated upon, after the election is over. The learned Judge, while holding that the provisions of the Act did not in any way affect the jurisdiction of the High Court under Article 226 or 227 observed that it is not proper to interfere with the orders of the Returning Officer before any election or co-option under the Act is notified.

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1. (1952) 1 M.L.J. 775.
2. A.I.R. 1965 M P. 258.

The contention that under the Madras Co-operative Societies Act, 1961, it was not intended to provide any remedy against the rejection of a nomination paper till the declaration of the result is made is based on the proviso in section 73 The section read as a whole makes it clear that the Registrar is not empowered to take the matter as an election dispute at any stage before the declaration of the result. But that does not mean that the Legislature intended that the question cannot be agitated before a civil Court or under Article 226 of the Constitution of India The right to resort to civil Court cannot be barred unless it is specifically prohibited. So also, the wide power of the High Court under Article 226 cannot be curtailed unless by one or other of the articles of the Constitution of India. The only question, therefore, that has to be considered whether it is desirable that the High Court should interfere at the stage before the election result is declared The answer to this question would depend on the facts of the case If the rejection of the nomination is without jurisdiction and on the face of it unsupportable in law and the denial of a remedy at this stage would cause considerable hardship to the petitioner, the High Court will not hesitate to exercise the powers conferred on it by the Constitution In this case it has been pointed out that neither the Act, the Rules nor the bye-laws disqualify the nomination on the ground that he seconded to the nomination of somebody else. In this connection it may be noted that under section 279 of the District Municipalities Act and under the Panchayat Act an elector desiring to stand is forbidden from signing the nomination paper as an elector or as secondor There is no such prohibition is the selection under the Madras Co-operative Societies Act and such prohibition cannot be inferred The rejection of the nomination papers, therefore, on the face of it is unsupportable.

Learned Counsel for the respondent contended that even if it is held that the rejection is illegal and unsupportable in law, the High Court should not interfere with it as the scrutiny committee is not a judicial or a quasi-judicial tribunal statutorily entrusted with the right and duty to decide disputes between parties Reliance was placed on the decision of a Bench of this Court reported in *Lakshmiah* v. *Sriperumbudur Taluk Co-operative Marketing Society Ltd* [1] In that case the petitioner prayed for the issue of a writ of *certiorari* to quash the proceedings of the Board of Directors of a Co-operative Society in so far as it related to the rejection of the nomination paper of the petitioner Certain regulations were framed by the Society for the conduct of election of Directors from among the members of the Society These regulations empowered the Board to consider the objections to the nominations for the election of members to the Board of Directors The Board was not a statutory tribunal, but was only discharging functions entrusted to it by regulations. Those regulations were framed by the Society itself and had no statutory force. On the facts, therefore it was held that a writ under Article 226 cannot be issued It is pointed out by the Bench that the petitioner could seek his remedy under section 51 of the Madras Co-operative Societies Act. Section 51 of the Madras Co-operative Societies Act, 1932, corresponds to section 73 of the Madras Co-operative Societies Act 1961. It is pleaded that the Bench decision is an authority for the proposition that a writ does not lie against the order of the scrutiny committee. Though section 73 of the 1961 Act is more or less the same as section 51 of the 1932 Act, it has to be noted that statutory rules were framed (The Madras Co-operative Societies Rules) under the powers conferred by sub-sections (1) and (2) of section 119 It is not denied that the rules are not statutory rules or that they are not enforceable by the issue of a Writ. After the enactment of the Madras Co-operative Societies Act, 1961, and the framing of the Madras Co-operative Societies Rules, 1961, and the framing of the Madras Co-operative Societies Rules, 1963 the decision *Lakshmiah* v. *Sriperumbudur Taluk Co-operative Marketing Societies Ltd* [1], is inapplicable.

On a consideration of all the circumstances in the case, I am satisfied that even though the results of the election have not been declared, this is a fit case in which a writ of *certiorari* should issue quashing the order of the scrutiny committee rejecting the nomination of the petitioner. The Writ Petition is allowed. No costs.

R M. —— *Petition allowed.*

1. (1961) 2 M.L.J. 279.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M. NATESAN.

Rajalakshmi and others .. *Appellants**

v.

Minor Ramachandran and another .. *Respondents.*

Hindu Minority and Guardianship Act (XXXII of 1956), *sections* 4 (b), 5 *and* 6—*Illegitimate Hindu minor—Mother is natural guardian—Powers of* de facto *guardian*—De facto *guardian, who is—Stranger gifting property to minor—Natural guardian alive—Donor's power to appoint another guardian for gifted property*

Even under the pre-existing Hindu law the mother was the lawful guardian of her illegitimate children At any rate this is the position after the coming into force of the Hindu Minority and Guardianship Act (XXXII of 1956) which by section 5 specifically overrides the previously existing law inconsistent with the provisions of the Act Under section 6 of this Act the natural guardian of a Hindu minor in the case of an illegitimate child, whether in respect of the minor's person or in respect of the minor's property, is the mother and after her the father is the guardian

One vital and important change introduced by the Hindu Minority and Guardianship Act in the pre-existing Hindu law relating to minors is that relating to the powers of a *de facto* guardian Under the Hindu law the powers of a *de facto* guardian of a Hindu minor to bind the minors' estate by alienations of immoveable property of the minor in case of necessity or for the benefit of the minor's estate have been recognised in numerous decisions. Section 11 of the Hindu Minority and Guardianship Act now takes away these powers completely After the commencement of the Act therefore no person shall be entitled to dispose of or deal with the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor Any alienation of immoveable property by a *de facto* guardian would be null and void and cannot bind the minor

A *de facto* guardian is one who not being a guardian in law, being neither a natural guardian or a testamentary guardian or a guardian appointed by Court, nevertheless has the care of the person or property of the minor

The mere fact that a person gifts property to a minor will not entitle that person by reason of the factum of the gift only to appoint a guardian for the minor in respect of that property, though it will be open for the donor to provide for the management of the property gifted by resorting to a trust

Thus, a person *sui juris* a stranger to the minor cannot by an instrument, when the lawful guardian is alive, appoint another person as the guardian of property of a minor for the reason only that the property is gifted by the maker of the instrument A lawful guardian may have to approach the Court if he wants to relinquish his guardianship during this lifetime But his powers as guardian of the property of a minor could not be taken away, even if he should be willing, by a third party without an order of the Court.

Appeals against the Decree of the Court of the Subordinate Judge, Cuddalore dated 16th August, 1961, in Appeal Suit No 59 of 1961, preferred against the decree of the Court of the District Munsif of Chidambaram in Original Suit No. 267 of 1958.

R Gopalaswamy Ayyangar, for Appellants.

P S. Srinivasan, for Respondents.

The Court delivered the following

JUDGMENT :—The defendants in a suit for declaration of title to properties and possession of the same with claim for mesne profits, are the appellants in this Second Appeal The facts relevant and material for the Second Appeal may be briefly set out

The suit properties originally belonged to one Anjalai Ammal, wife of Arumugha Padayachi, the putative father of the plaintiffs in the suit. They are the children of Arumugha Padayachi by his concubine Marimuthu Ammal Anjalai Ammal having no male issue, under the deed of settlement Exhibit A-1 dated 25th October, 1955, settled the suit properties on the minor plaintiffs. The deed of settlement refers to Arumugha Padayachi as their protector, father and guardian, and it is recited therein that the properties which had been settled on them are on their behalf placed in possession of their guardian, the said Arumugha Padayachi. Certain conditions are imposed under the deed enjoining the settlees to maintain Arumugha Padayachi during his lifetime, the properties to be taken by the plaintiffs

*S.A. No. 953 of 1962. 11th March, 1966.

after his lifetime with absolute rights. A charge is provided in favour of Arumugha Padayachi for his maintenance. The settlement deed referring to a mortgage over the properties in favour of one Subramania Pillai and directing payment of Rs 880 towards that mortgage provides that to the extent of the said sum of Rs 880, if it becomes necessary for its discharge, the guardian will have power to mortgage the properties and borrow, or sell a portion of the properties The properties are valued at Rs. 1,500 and there is specific prohibition against any alienation of the properties except to the extent of and for the purposes provided in the deed and above set out. The settlor, it may be stated, has, under the settlement deed, parted only with a share in the items she owned retaining to herself the remaining share. Arumugha Padayachi did not pay the mortgagee the sum of Rs 880 as provided under the settlement deed and the mortgagee filed the suit, O S. No 334 of 1956 on the file of the District Munsif's Court, Chidambaram, for recovery of the mortgage amount The plaintiffs were parties to that suit and a preliminary decree for the full mortgage amount had been passed against the plaintiffs and Anjalai Ammal The guardian, despite the injunction in the settlement deed, first mortgaged items 3 and 4 of the suit properties to the second defendant for a sum of Rs 200 on 2nd June, 1956, and later, on 1st December, 1956, along with Anjalai Ammal he sold the items for a sum of Rs. 500 under Exhibit B-2. It is the finding that no portion of the consideration went in discharge of the mortgage in favour of Subramania Pillai. Again with Anjalai Ammal as co-vendor under Exhibit B-3 dated 1st December, 1956, the remaining properties settled on the minor plaintiffs, that is, items 1 and 2, were conveyed to the first defendant for a sum of Rs 3,500 Anjalai Ammal had joined in these two conveyances as co-vendor, since the share in the properties which she had retained has also been the subject of the conveyances. The consideration for the latter sale deed is made up of four items · (1) a sum of Rs 880 payable by the plaintiffs towards the mortgage in favour of Subramania Pillai, (2) a sum of Rs 1,620 the balance payable for the mortgage as paid by Anjalai Ammal, (3) a sum of Rs 130 cash received by Anjalai Ammal, and (4) Rs 870 left with the vendees to be paid on the minor settlees becoming majors and executing a registered deed of release.

The trial Court refused to accept the plea that it would not have been possible for Arumugha Padayachi to dispose of part only of the properties settled and pay off the mortgage to the extent of Rs. 880 There is a finding by the trial Court that the vendees have not acted in good faith at all As regards the sale under Exhibit B-2 there can be no question at all about its invalidity It is wholly beyond the powers of the guardian. As regards the sale for Rs. 3,500 evidenced by Exhibit B-3 the appellate Court is of the view that Arumugha Padayachi would be well within the bounds to sell items 1 and 2 as he had authority to sell the properties if needed for paying off the sum of Rs 880 towards the mortgage. The appellate Court has not considered the reasoning of the trial Court in this regard that there was no necessity to sell the entirety of the properties. But the appellate Court concurred with the trial Court in holding that the alienations evidenced by Exhibit B-2 and Exhibit B-3 being both subsequent to the coming into force of the Hindu Minority and Guardianship Act of 1956 the sale by Arumugha Padayachi who was not the legal guardian of the minor plaintiffs is invalid under the provisions of the said Act.

Basing himself on the finding of the lower appellate Court that Arumugha Padayachi would be justified under the provisions of the settlement deed to sell items 1 and 2 for payment of the mortgage amount, learned Counsel for the defendants contends before me that the view of the Courts below as to the applicability of the Hindu Minority and Guardianship Act of 1956 in the circumstances of the case is erroneous He argues that Arumugha Padyachi has been specifically named and appointed guardian of the minor plaintiffs under the settlement Exhibit A-1 and therefore he would be a legal guardian even under the said Act to effect the conveyance It is submitted that section 11 of the Act prohibits only a *de facto* guardian from disposing of or dealing with the property of a minor and that Arumugha Padayachi is not just a *de facto* guardian but a lawful guardian.

At the outset it should be pointed out that the settlement deed does not purport to appoint Arumugha Pachayachi as guardian of the properties which were settled on the minor plaintiffs The document assumes Arumugha Padayachi to be guardian of the minors and only limits his powers of alienation In my view, apart from the question of the validity of the appointment, the contention is not open on the terms of the settlement deed that by the instrument Arumugha Padayachi has been appointed as guardian of the minors for the properties settled. It must next be noticed that Anjalai Ammal the settlor, so far as the minors are concerned is a total stranger and the putative father was himself not the lawful guardian of the minors at that time The plaintiffs are admittedly the illegitimate children of Arumugha Padayachi by his concubine Manimuthu Ammal. In the plaint it is specifically mentioned that the mother of the plaintiffs was living This plea specifically disentitling any guardianship of the minors in Arumugha Padayachi has not been traversed in the written statement It must therefore be taken that at all relevant periods the mother of the plaintiffs was alive. As pointed out in Mulla's Hindu Law, 12th Edition, at page 681, the mother is the lawful guardian of her illegitimate children This proposition is well established No doubt there is an observation therein that where the father is knowm, he has a preferential right and the case in *Mussammat Prem Kaur* v *Banarsi Das*[1], is relied on for this proposition The case in question arose on an application by the putative father for the custody of the child by his regularly kept concubine. It did not relate to property and our Court in *Dorai Raj* v. *Lakshmi*[2], has expressed dissent from the view taken in the decision. But it is unnecessary to discuss the law prior to the Hindu Minority and Guardianship Act of 1956 This Act specifically supersedes the previously existing law and the overriding provision is found in section 5 of the Act which runs thus :

> " 5. Save as otherwise expressly provided in the Act .
>
> (*a*) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act, shall cease to have effect with respect to any matter for which provision is made in this Act ,
>
> (*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act "

Under section 6 of the Act the natural guardian of a Hindu minor in the case of an illegitimate boy, whether in respect of the minor's person or in respect of the minor's property, is the mother and after the mother the father is the guardian. So on the Act coming into force the mother of the minors can be and is alone the guardian of the person and property of the minors. As pointed out already the defendants have not even traversed the allegation in the plaint that the mother of the minor plaintiffs is alive It will be seen that though the provisions of the Act are supplemental to the Guardian and Wards Act of 1890, the Act in statutory form crystallises as to who are the persons entitled to act as natural and testamentary guardians of a Hindu minor The Act further imposes certain limitations on the powers of the guardian in the matter of disposal and management of the immoveable property of a minor Under the Act neither the natural guardian nor the testamentary guardian can now, without the sanction of the Court, mortgage, charge or sell or otherwise alienate any immoveable property of a minor or lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date of attainment of majority by the ward Any disposal of immoveable property by a natural guardian or testamentary guardian incontravention of the limitations set out in the Act is voidable at the instance of the minor.

One vital and important change introduced in the Hindu Law relating to minors is that relating to the power of a *de facto* guardian. Under the Hindu Law the powers of a *de facto* guardian or a *de facto* manager of a Hindu minor's property to bind the minor's estate by alienations of immoveable property of the minor in case of necessity or for the benefit of the minor's estate have been recog-

1. I L R 15 Lah 630. I L.R 1947 Mad 519.
2. (1946) 2 M L J. 318 , A.I.R. 1947 Mad. 172

nised in numerous decisions Section 11 of the Act now takes away these powers completely. After the commencement of the Act, no person shall be entitled to dispose of or deal with the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor. The contention of Mr. R. Gopalaswami Iyengar to get over this interdict is that Arumugha Padayachi is not a *de facto* guardian but a guardian Reference is made to section 4 (*b*) of the Act where guardian is defined thus :

> " 'Guardian' means a person having the care of the person of a minor or of his property or of both his person and property and includes—
> (i) a natural guardian,
> (ii) a guardian appointed by the will of the minor's father or mother,
> (iii) a guardian appointed or declared by a Court, and
> (iv) a person empowered to act as such by or under any enactment relating to any Court of Wards "

It is not claimed that Arumugha Padayachi is either a guardian appointed by the will of the minor's father or a guardian appointed or declared by the Court Nor does Arumugha Padayachi come under section 4 (iv) The argument is that these four sub-clauses are only indicated as included in the term ' guardian ' and therefore there can be a guardian outside these four such clauses But the question is what is the character of such a guardian As to who can be termed a *de facto* guardian is found in decision of the Division Bench of this Court in *Palani Goundan* v *Vajiakkal*[1], where it is stated :

> " A *de facto* guardian is one who is not a legal guardian in the sense that he is either a natural guardian or a testamentary guardian or a Court guardian, but who being interested in the minor though a stranger, takes charge of the management of the minor's property "

Section 4 (2) of the Guardians and Wards Act (VIII of 1890) defines guardian as " a person having the care of the person of a minor or of his property, or of both his person and property." In *Sitha Bai* v. *Radha Bai*[2], it is found stated that a *de facto* guardian is a guardian within the meaning of section 4 (2) of Act VIII of 1890 Guardian means a person having the care of the person of a minor or of his property or both under the present Act also Here admittedly Arumugha Padayachi has the care of the properties of the minor plaintiffs He is not a guardian in law, being neither a natural guardian or a testamentary guardian or a guardian appointed by Court He will therefore be a guardian in fact, that is a *de facto* guardian. So the interdiction under section 11 of the Hindu Minority and Guardianship Act of 1956 would certainly apply to the acts of Arumugha Padayachi as guardian, *de facto* Trevelyan in his law relating to minors recognises only three classes of guardians, natural, testamentary and appointed by Court or a Court of Wards.

While the mother of the minor plaintiffs is alive and is the guardian, I doubt if at all it will be open to a stranger like Anjalai Ammal to appoint a guardian for the minor's properties As pointed out by Lord Parker in *Beasant* v *Narayaniah*[3] " Among Hindus the father is the natural guardian of his children during their minority, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place ". No doubt the case related to the custody of a minor. In *Chidambara Pillai* v. *Rangaswami Naicker*[4], Coutts Trotter, J , observes :

> " To me on the contrary it seems that to put a person in a definite legal relation to property which he is not the owner is a step which cannot be taken unless there is legal authority for taking it "

I take it that legal authority may be found in custom, judicial decisions or in statute. In the Full Bench case cited above, Seshagiri Ayyar, J , observes :

> " An examination of the citations shows that whereas the right of appointing a guardian for the person of an infant has been in some systems regarded as the natural or the natural right of the parent, in none of them has it been stated that the right to appoint a guardian of property is a common law right "

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1 (1965) 1 M L J 498 I L R 1956 Mad. 1062
2 36 M L J 189
3. I.L R. 38 Mad 807 . L R. 41 I A. 314 : 27 M L J 30.
4 (1918) 34 M L J 381 I L.R. 41 Mad. 561 at 572 and 573 (F B).

The question before the Full Bench in *Chidambara Pillai* v *Rangaswami Naicker*[1], was as to the competency of an adult coparcener of a Mitakshara family to appoint a testamentary guardian to the coparcenary property of the minor coparcenar and the competency was found against In the present case we are concerned with a person *sui juris* a stranger to the minor and her right to settle her properties appointing a guardian for the particular properties Of course there will be no difficulty for the settlor to provide for the management of the properties during the minority of the settlees by a device of trust Some of the observations of the Full Bench case above referred to have no doubt been the subject of some consideration in *Konthalathammal* v. *Thangasamy*[2], where the power of a Hindu father to appoint by a will a guardian of the person of his minor children and their property not being joint family property, was recognised. But I have not been referred to any authority where a father or mother or other lawful guardian even, could during his lifetime, part with his or her powers as guardian by an instrument *inter vivos* In *Konthalathammal* v *Thangaswamy*[2], Devadoss, J., observes :

> " If the father has not the right to appoint a guardian by will for his minor son by virtue of the power of disposition of his separate or self-acquired property, for it is a well-known principle of law that a testator cannot appoint a guardian for a minor legatee only by reason of the disposition in his favour, a testator can appoint trustees to hold property for a legatee and that does not depend upon the legatee being a minor So the right to appoint a guardian for a minor son is to be sought for elsewhere than in the power to bequeath the property to him "

Applying this principle, the mere fact that a person gifts property to a minor will not entitle that person by reason of the factum of the gift only to appoint a guardian for the minor in respect of that property Repeating what has already been stated, it will be open to the donor to provide for the management of the property gifted by resorting to a trust. In the present case Anjalai Ammal is a stranger and it is inconceivable that she could clothe another person with the character of a guardian of the property of the minors, when she herself is not one In *Dhanpat Ram* v. *Premsingh*[3], it is held that a man has no power to appoint a guardian of his minor nephew under the Hindu Law.

In the light of the above discussion it is clear that Arumugha Padayachi cannot claim to be either guardian by instrument or natural guardian. Reference was made to a decision in *Thangapandian* v *Kuchu Bomma*[4], where the word ' instrument ' came up for consideration The question was whether the appointment of the natural father as guardian to his son who had gone out in adoption under a consent decree in a suit, could be considered to be an appointment of a guardian by instrument and this Court rejected the claim that the apointment of a guardian under the circumstances was an appointment under an instrument This Court held that at least he can be regarded as a *de facto* guardian It was observed .

> " It is a well settled proposition of law, that, by means of a testamentary disposition, a person governed by the Hindu Law can appoint a guardian for the estate of a minor We are unalbe to see why the same effect should not be achieved by some other kind of document, which may be a deed of settlement, or a deed of gift If that can be done and there are certainly recognised instances the common factor between the two words will be the creation of a guardianship by the document, and that would justify the interpretation of the word ' instrument ' in section 39 as *ejusdem generis* with the preceding word " will " For these reasons we have to hold that the appellant is not a person and cannot claim to be a person, appointed or declared by the Court as guardian or a guardian appointed by a will or other instrument "

Learned Counsel contends on the authority of this decision that a guardian could be appointed by a deed of gift The reference to the deed of gift in the aforesaid decision must be taken in its context. All that is meant is that a testamentary guardian could be appointed by a deed which may in fact be a deed of settlement or deed of gift. That does not mean that there could be a transference of guardianship by deed even during the life time of the lawful guardian That decision is far from authority for the position that anybody and everbody could by instrument when the lawful guardian is alive, appoint another person as guardian of property of the minor for the reason only the property is gifted by the maker of the instrument. It indicates just the contrary. Trevelyan points out at page 65 of the Vth

1. (1918) 34 M.L J 381 : I L R. 41 Mad 561 (F B.)
2. 45 M L J. 481 : I L.R. 46 Mad. 873 at 886.
3. 12 I C 452.
4. (1966) 1 M L J 175 at 178.

Edition of his Law relating to Minors that appointment by deed is in its nature testamentary. A lawful guardian may have to approach the Court if he wants to relinquish his guardianship during his lifetime. But his powers as the guardian of property of a minor could not be taken away even if he should be willing, by a third party without orders of Court. That apart on my reading of the settlement deed, Anajalai Ammal does not purport to appoint Arumugha Padayachi as guardian. She has only assumed him to be the guardian. In these circumstances, this decision does not help the appellants.

In the result it must be held that the alienation by Arumugha Padayachi of the suit properties which had been settled on the minors by Anjalai Ammal are void and cannot bind the minors.

A decree for past mesne profits has been awarded and assessment of future mesne profits is left open for separate proceedings Learned Counsel submits that in the present case there was a mortgage decree against the minors and if the mortgagee had brought the properties to sale and sought to sell away the entirety of the properties, Arumugha Padayachi could have maintained no legal objection to the same. It is submitted that it was in these circumstances the conveyance had been resorted to. It is pointed out that it was nobody's case that the sale was at an undervalue. In the circumstances learned Counsel submits that the first defendant could not be called upon to account for past mesne profits. There is something to be said for this contention.

The lower Court has directed the plaintiffs to deposit into Court a sum of Rs. 880 with interest thereon at 5½ per cent. per annum from 13th March, 1957 till the date of deposit In my view it will be just and fair to pass an order in the following terms in respect of mesne profits, so far as the first defendant is concerned.

The first defendant shall deposit into Court for payment to the plaintiffs as interest on the sum of Rs. 870 which he had retained, an amount calculated at 5½ per cent. per annum on Rs. 870 from 1st December, 1956 till the date of deposit by the plaintiffs of the sum of Rs 880 The order of the lower appellate Court in regard to the sum of Rs 880 to the extent only of the provision for payment of interest thereon from 13th March, 1957 till deposit is set aside. The plaintiffs will be entitled to mesne profits on their share in the properties conveyed to the first defendant under Exhibit B-3 only from the date of deposit by the plaintiffs of the sum of Rs. 880 till the plaintiffs are given possession of the properties Subject to this modification of the decree against the first defendant the second appeal is dismissed. The parties will bear their respective costs in this Court. No leave.

V K. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

MR. JUSTICE T. VENKATADRI

Valliammal Achi .. *Appellant**

v.

V. R. V. S Singaram Chettiar .. *Respondent*

Hindu Marriage Act (XXV of 1955), sections 10 (1) (f) and 13 (1) (i) 'Living in adultery'—Meaning of—Standard of proof of adultery in matrimonial suits.

The words "is living in adultery" means a continuous course of adulterous life, as distinguished from one or two lapses from virtue

The standard of proof of adultery in matrimonial suit is proof beyond reasonale doubt.

Adultery from its nature, is a secret act. Direct evidence of an act of adultery is extremely difficult It is very rarely indeed that the parties are surprised in the direct act of adultery. The Court will tend to look upon direct evidence, even if produced, with disfavour, as it is highly improbable that any person can be a witness to such an act, as such an act is generally performed with utmost secrecy.

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*A A.A O. No 21 of 1964. 18th March, 1966.

Appeal against the order of the Additional District Court (Estates Abolition Tribunal), Ramanathapuram at Madurai, in A S No 135 of 1961—O P No 26 of 1960, Sub-Court, Sivaganga.

S. Parthasarathy and *R Ramanujam*, for Appellant.

V. Srinivasan and *N Subbiah*, for Respondent.

The Court delivered the following

JUDGMENT :—This is an appeal preferred by the wife against an order of the learned District Judge granting divorce on the ground that she was living in adultery, thereby reversing the order of the learned Subordinate Judge who dismissed the application of the husband under sections 10 (1) (*a*) and (*f*) and 13 (1) (i) of the Hindu Marriage Act of 1955

The appellant and the respondent were married in the year 1947 The respondent used to go away to Colombo where he was earning his livelihood He used to visit his wife and children in India occasionally He has alleged that during his absence in Ceylon his wife fell into immoral ways He has alleged that he received a letter from his mother that the appellant was living in adultery with one Ramiah and one Krishnan. When he came to India in 1958, he actually saw the appellant—so he alleges—leaning against Ramiah in the kitchen of his house and that on seeing him Ramiah ran away The respondent has further alleged that one Sethuramalingam developed illicit intimatcy with the appellant and that they lived as man and wife. Evidence was adduced that the appellant and the said Sethuramalingam lived in the house of P W 3 to carry on their carnal pleasures. It is also alleged that on a particular occasion this Sethuramalingam was actually caught in the house of the respondent and produced before P W 2 Sundaram Chetti, who was the President of the Panchayat Board His evidence is supported by P W 5, Lakshmanan Chettiar, who deposed that on information given by a watchman he went and saw the appellant and Sethuramalingam in the house of the respondent P W 6, a provision shop-keeper has deposed that he has seen Sethuramalingam visiting the house of the respondent and living with the appellant.

It may be stated that before the husband filed the petition for the dissolution of his marriage with the appellant, the appellant herself filed an application under section 488, Criminal Procedure Code, for maintenance That application was opposed by the husband on the ground of adultery on the part of his wife. But the learned District Magistrate of Ramanathapuram at Devakottai, after considering the evidence adduced before him, came to the conclusion that it could not be said that the wife was living in adultery The learned Magistrate granted maintenance to the appellant at the rate of Rs 30 per mensem The learned Subordinate Judge has observed in this case that the oral evidence does not conclusively show that the wife is living in adultery and that the stray lapses on her part would not be sufficient for the application of section 13 (1) (i) of the Act

Documentary evidence was also adduced at the trial and much reliance was placed on Exhibit A-3 to A-10 Exhibits A-3 to A-10 are letters alleged to have been written by the appellant to Sethuramalingam These letters are not signed, and the appellant has denied the contents of these letters. These letters have been produced by the husband himself, with the story that he met Sethuramalingam at the bus stand, that on discreet enquiry he understood that he was having some letters written by his wife, and that on his requesting him to produce the letters, Sethuramalingam went home and got the letters The whole story seems suspicious It is strange that a paramour would hand over such letters all on a sudden to the husband of the woman and that in a public place No doubt Sethuramalingam has given evidence supporting the case of the husband. But the learned Subordinate Judge has rightly observed this incident as unnatural and improbable Exhibit A-1 is another document relied on by the husband. That letter would only show that the appellant was being treated cruelly by the respondent at the instigation of his mother. In that letter, the wife begs of her husband to

take her back into the family and she has assured the husband that she would live with his mother amicably There is nothing in that letter to indicate that the appellant has been living in adultery. Another important letter is Exhibit A-2 alleged to have been written by the appellant and given to P W. 2. There is an interlineation in Exhibit A-2 referring to the name of Ramiah of Tirupattur. The learned Subordinate Judge has not placed any reliance on this letter, because the evidence of P W 2 was not convincing. If really P W. 2 wanted to bring about some reconciliation, it would have been in the form of an agreement signed by both the parties. Thus the trial Court rejected, and rightly in my opinion, the documentary evidence also relied on by the respondent to show that the appellant was living in adultery However, the lower appellate Court has believed the documentary evidence and has found that the appellant was living in adultery.

Coming to the case-law on the subject, there has been a difference of opinion in the Courts of British Commonwealth as to the standard of proof necessary in matrimonial causes. In *Ginesi* v *Ginesi*[1], the Court of Appeal decided that the standard of proof of adultery in a matrimonial suit was proof beyond reasonable doubt But the High Court of Australia in *Briginshaw* v *Briginshaw*[2], took a contrary view. In *Loveden* v. *Lovedon*[3], it was observed that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. Denning, L J, in *Bater* v *Bater*[4], considered that the phrase "reasonable doubt" did not imply the same strict standard of proof as that which prevails in criminal proceedings. In *Lyons* v *Lyons*[5] the Lord Chief Justice of Nothern Ireland observed:

"To apply the full criminal standard of proof in all cases of divorce . would in a large measure nullify jurisdiction and amount in many cases to a denial of justice . . The rights and privileges of civil status, and 'the peculiar duty of protecting the sanctity of marriage' call for a higher standard of proof than is required in ordinary civil proceedings which are determined by the preponderance or weight of evidence and the balance of probabilities"

In *Preston Jones* v. *Preston Jones*[6] the House of Lords decided that the husband had established his case beyond reasonable doubt. Finally in *Galier* v. *Galier*[7] Hodson, L J, observed :

" . . the Courts of this country have come down on the side of the view that.... in divorce, as in crime, the Court has to be satisfied beyond reasonable doubt."

Bearing these principles in mind in this case, I am of the opinion that the respondent has not established beyond doubt that the appellant has been living in adultery.

Adultery, from its nature, is a secret act Direct evidence of an act of adultery is extremely difficult. It is very rarely indeed that the parties are surprised in the direct act of adultery. The Court will tend to look upon direct evidence even if produced with disfavour as it is highly improbable that any person can be a witness to such an act as such an act is generally performed with utmost secrecy. Many High Courts have held the words "is living in adultery" to mean a continuous course of adulterous life as distinguished from one or two lapses from virtue.

Ramaswami, J, in *Mahalinga Pillai* v. *Amsavalli*[8], has considered the case-law on the subject elaborately, and has observed at page 294 thus :

"There is a distinction between 'committing adultery' and 'living in adultery', living in adultery means, following in a course of adulterous conduct more or less continuous, a single act of adultery cannot be considered as living in adultery"

In *Rajani* v *Prabhakar*[9], soon after the marriage the wife went and lived for about three weeks in the house of a friend of her father where she developed illicit intimacy with his son. Documentary evidence was produced to show that she was living in illicit intimacy with him This was quite some time before the petition

1. (1948) 1 A E R 373.
2. (1938) 60 C L R 336
3. (1810) 2 Hag Con 1
4. (1950) 2 A E R 458.
5. 1950 N.I. 181.
6. L R 1951 A C 391
7. (1954) 1 A E R 536 at 540 and 541.
8. (1956) 2 M L J. 289
9. A.I.R. 1958 Bom. 264.

for the dissolution of the marriage by the husband. The learned Judges held that it would be difficult in the circumstances to hold that the petitioner's wife's conduct would fall within the purview of clause (i) of sub-section (1) of section 13 of the Hindu Marrigage Act, so as to entitle the husband to a decree for divorce against her.

Bearing these principles in mind, if we examine the facts of this case, we find that there is no other documentary evidence except Exhibit A-2 which is worth considering The other letters Exhibits A-3 to A-10 have not been believed by the trial Court I cannot imagine how P W 4 a stranger to the respondent would give him such letters and that at the public place Exhibit A-2 has an interpolation which refers to Sethuramalingam I have already stated that it is not worth considering Taking a comprehensive view of the evidence and the facts of the case, I am of opinion that the story of the husband, that his wife has been living in adultery with Sethuramalingam cannot be believed It gives me the impression that the husband did not like to take back his wife especially after she obtained a maintenance decree against him.

In the circumstances, I allow the appeal There will be no order as to costs. No Leave.

V.K. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction.)

PRESENT.—MR M ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE P RAMAKRISHNAN.

The Executive Officer, Bhavani Panchayat, Bhavani .. *Appellant**

v.

M K. Mani Iyer . *Respondent.*

Municipalities and Panchayats—Application for grant of licence to run hotel—Licence if could be refused on the ground that the applicant has no right to possession of property on which the trade is proposed to be carried on.

Constitution of India—Art 19 (1) (g)—Licence to carry on business as a hotelier—If could be refused on the ground that the person has no right to occupy the premises which is sought to be licenced

It is no doubt true that every citizen has a right to pursue a trade or avocation on a property on which he is entitled to remain In cases of licenced trades like a hotel or restaurant, which requires a licence from the concerned municipality or panchayat, the authorities are really regulating the trade or profession in public interest It is well settled that in granting or refusing to grant a licence the authorities might take into consideration several factors relating to the premises in which the trade is sought to be carried on, such as safety, sanitation etc Equally it will be a relevant consideration whether the interest of applicant over the property or his title to possess the same is clear enough to justify the grant of a licence for the period for which it is sought for or any shorter period Where a property has been acquired by the State in exercise of their power of Eminent Domain, it puts on end to all prior private rights like that of a lessee or mortgagee.

Hence when a person applies to the panchayat for licence to conduct a hotel on a site which has been acquired by the State under the Land Acquisition Act, the panchayat can refuse to grant the licence taking into consideration the hazard or insecurity of possession of the applicant to the site.

Appeals under Clause 15 of the Letters Patent against the order of Honourable Mr. Justice Srinivasan, dated 21st September, 1965 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos 1220 and 1221 of 1965 respectively presented under Article 226 of the Constitution of India to issue a Writ of *Certiorari* (W P No 1220 of 1965) calling for the records of the respondent therein in O M No P. 417/65 dated 25th February, 1965 and quash the same and to issue a writ of mandamus (in W P No 1221 of 1965) directing the respondent therein to renew the licence for the year 1965-66 for the building situate at No. 3/7-A, Bus Stand, Bhavani, for the purpose of running a Coffee Hotel.

V. Ramaswamy and *K. Alagiriswami*, for Appellant.

S. Mohan and *K. Doraiswami*, for Respondent

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* Writ Appeal Nos. 28 and 29 of 1966. 29th March, 1966.

The Judgment of the Court was delivered by

Anantanarayanan, O C J.—The Writ Appeals before us are from the judgment of Srinivasan, J, W P Nos 1220 and 1221 of 1965 in which the learned Judge upon the submissions in the petitions of one M. K Mani Iyer, has directed the issue of a writ of mandamus against the Executive Officer of Bhavani Panchayat (Coimbatore district), requiring the officer to renew a hotel licence for the year 1965-66. A great deal of the area covered by the learned Judge in his judgment, may not now be relevant for the short and clear ground on which, in our view, the writ appeals will have to be allowed In order to maintain the focus clear, we purposely intend not to enter into several areas of the controversy, and we agree with the learned Judge in his view that the proceedings before him did involve certain somewhat unusual features But whatever may be said about that, or about the previous history of the case, or the particular manner in which the proceedings of the Bhavani Panchayat had been worded, we think it is abundantly clear, that, in law, the situation did arise in which the Panchayat had justification to decline to renew the licence, on a ground relevant to public interest, and not merely a ground of personal interest, or animosity against the writ petitioner. For the purpose of clarifying that situation, the following facts will be sufficient.

We may take it that the application for licences was in respect of a piece of property in which the writ petitioner originally had a leasehold interest, the lesser being a certain Parasurama Pillai. But it is not in dispute before us that this property was validly acquired for the Panchayat, in exercie of the powers of Eminent Domain by the State, for a definitely public purpose connected with public interest. One point which is really not in dispute before us is that, when such acquisition takes place, it puts an end to all prior encumbrances and private rights in the property, even the rights of a mortgagee have to be relegated to the claim to the compensation amount which may be deposited into Court, and neither a mortgage nor lease can survive a valid acquisition. That being indisputably the case, after this acquisition, there was an order of the Collector which originally gave a term of two years to the occupiers of the property concerned, whether lessees or otherwise, to vacate the premises and to permit the Panchayat to use the property for public purpose, namely, formation of the Bhavani bus stand.

It is not in dispute that this period of two years came to an end on 19th August, 1961 and it is not also in dispute that, even after this, the writ petitioner did not vacate the property, upon which he had erected or he intended to erect the hotel for the licence for which he had made the application. There is the order of the Collector declining to give any further extension of time and directing the Executive Officer of the Panchayat to take action to obtain possession of the premises. What happend subsequently, which has been dealt with at some length by the learned Judge in his order, really relates to the rights *inter se* the writ petitioner and the Panchayat, in the matter of the proposed eviction, namely, whether the writ petitioner was a mere trespasser as contended by the Panchayat, or whether the writ petitioner could claim that he was a statutory tenant, or a statutory tenant holding over, which view seems to have found some acceptance with the learned Judge. This matter really does not touch the heart of the controversy now involved, for a very simple reason.

The situation at law is not disputed by learned Counsel for the writ petitioner (Sri Mohan) that, where a property is acquired for a public purpose by a public body, private leasehold rights will not survive the acquisition. Thus, the Panchayat had every justification and indeed had a duty after the expiry of the further period of two years given as a term of grace, to obtain possession of the property, if necessary by evicting the occupants thereof. The public purpose, namely, formation of the bus stand, would have been frustrated, if this could not be done. It appears that subsequently. there was an order of interim stay by this Court in writ proceedings, and that finding such an order of stay existed as a bar to eviction the Panchayat proceeded to accept payments equivalent to rent made by the writ petitioner for occupation. This acceptance according to the learned Additional Government

Pleader was an involuntary acceptance compelled by the situation in the writ proceeding and not at all of that character of voluntary acceptance which would create a statutory tenancy However that might be, the point is not this, but the question is whether the Panchayat has a valid reason linked to public interest, for refusing the application of the writ petitioner for the grant of license for one year, that is, for the year ending 31st March, 1966 That is the only matter which is really involved in the proceedings, for, essentially, the writ of mandamus directs renewal of the licence for this particular year.

On this point, we are unable to see any room for doubt, whatever might be the equities of the case in other respects relating to eviction, or to the proposed eviction. The true situation at law, we think is that every citizen has a right to pursue the trade or avocation of a hotelier, and to conduct a hotel or restaurant business, in a property where he is in a position to erect the requisite building. In regranting or refusing a licence, for the conduct of such hotels or restaurants, the Panchayat is really regulating this trade or profession in the public interest, and imposing such restrictions and limitations as public interest may require. Admittedly, they may relate to the sanitation or the insanitary state of the concerned property, the nature of the structure, any hazard to health that might result from attendant circumstaces, such as the ground specified in *Abdul Kareem* v *Corporation or Madras*[1], etc. Licence can be validly refused for one kind of property, but granted in respect of another plot with a different situation. Where the application specifies that the licence is requird for a period of one year, under the Act, the Panchayat has also the right to consider whether the interest of the applicant over the property or his title to possess the same is clear enough to justify sanction for this period That is a relevant consideration and a consideration in the public interest and we do not see how this inference can be doubted That being the case, if the property or site had been acquired through process of Eminent Domain for a totally different purpose and there was the hazard or insecurity that at any time within the year, that concerned authority might succeed in occupying the area for that valid purpose, the Panchayat had every right to take into consideration this hazard or insecurity of possession, as a ground for declining to grant licence for the year.

Sri Mohan has drawn our attention to the relevant provision of the Act and the Rules, and we see that the application for licence may be for a year or for a lessor period. It would have been a different matter if the applicant had applied only for a short period claiming that, within the period, his possession could not be conceivably disturbed. In any event, now that the period is coming to an end with 31st March, 1966, the entire proceeding is really of acadamic interest But we think that the writ appeal ought to be allowed if only to affirm the principle that, in declining to grant such a license for one year, the local body is entitled to take into consideration, as a reason for such refusal, the fact that the property had been acquired by Eminent Domain for a wholly different purpose, that the petitioner will presumably have no further legal right to continue in possession of that property, so as to exclude the implementation of that public purpose, and, consequently, that the situation as to his further right to stay on the property, even for a small part of that year, was hazardous in the extreme We also hold that this is a consideration in the public interest, and not a consideration of mere animosity or hostility to a private party, the petitioner. Sri Mohan strenuously contends that the matter is not phrased in this form at all, in the order declining the renewal It is a bald statement that the petitioner is a trespasser on the property, who is being treated as such We cannot expect executive officers of local bodies, in drafting such orders, to bear in mind, and to carry into effect all the refinements which the legal situation may require. We must be satisfied if the ground for refusal is one that can find recognition in law, and on the legal principles involved. Accordingly, we allow the writ appeals, and vacate the writs in these two cases These observations of ours are not intended to be any comment or reflection, in any way whatever, on the subsequent writ petition that we are informed had been filed by the writ petitioner, with regard to

1. (1940) 2 M.L J. 597 : A.I.R. 1941 Mad. 19

some subsequent order declining to grant the application for licence for the period April, 1966 to March 1967. Ordered accordingly The parties will bear their own costs

R M — *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT —MR JUSTICE P. S KAILASAM.

M Mani .. *Petitioner**

v

A Sellamuthu, Ariyaloor Town Panchayat, Ariyaloor, and another . *Respondents.*

Madras Panchayats Act (XXXV of 1958), section 25—Moral delinquency—Meaning—Agitation against rise in prices—If involves moral delinquency—Offence under section 143, Penal Code and section 7 (1) (a) of Criminal Law Amendment Act committed while agitating against rise in prices—Person convicted for, if disqualified to be a member of a panchayat.

The word "moral delinquency" would mean an act which would be offensive to the morals An agitation against the Government against the rise in prices of commodities, whether justified or not, cannot be said to involve any moral turpitude If in the course of the agitation any law is transgressed the offender would be liable to punishment But that would not involve any moral delinquency To hold otherwise would mean that the person involved in any form of agitation should be found guilty of moral delinquency

Thus, where the petitioner and others while agitating against rise in prices, formed themelves into an unlawful assembly and obstructed the staff of the Revenue Divisional Office from attending to their duties and for this act the petitioner was convicted under section 143, Penal Code and section 7 (1) (*a*) of the Criminal Law Amendment Act, 1932.

Held, it could not be said that the petitioner was convicted for an offence involving moral delinquency as to disqualify him from being a member of a panchayat under section 25 of the Madras Panchayats Act

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to O P No. 40 of 1965 on the file of the 2nd respondent herein dated 6th December, 1965 and quash the said order and made therein.

P R. Gokulakrishnan, for Petitioner.

R Sundaralingam, for 1st Respondent.

The Court made the following

ORDER.—This writ petition is filed for the issue of a writ of *certiorari* calling for the records pertaining to O P No 40 of 1965 on the file of the Election Tribunal cum the District Munsif of Ariyalur and for quashing the order passed by the second respondent on 6th December, 1965 The petitioner is a member of the Ariyalur Panchayat having been elected from Ward No 11 on 31st January, 1965 The first respondent was also elected as a member from Ward No. 6 The first respondent filed O P No 40 of 1965 on the file of the District Munsif's Court, Ariyalur, under section 28 (1) of Madras Act XXXV of 1958 alleging that the petitioner and others formed themselves into an unlawful assembly on 19th July, 1962 with the common object of obstructing the State Government Officers from attending to their work and in the course of the agitations squatted on the entrance of the Ariyalur Revenue Divisional Officer's office obstructing the officers from going into the office, an offence punishable under section 143, Indian Penal Code and section 7 (1) (*a*) of the Criminal Law Amendmnet Act, 1932 For that offence the petitioner was tried and sentenced to rigorous imprisonment for two months on each count on 16th August, 1962 It was contended by the first respondent that the offence involved moral delinquency and therefore the petitioner was disqualified from being a member of the Panchayat.

*W. P. No. 4874 of 1965. 18th April, 1966.

The Election Tribunal cum District Munsif agreed with the contentions of the first respondent and held that the petitioner was disqualified from being a member. This petition is preferred against that order.

It is admitted that the petitioner was charge-sheeted by the Sub-Inspector of Police, Ariyalur, for an offence under section 143, Indian Penal Code and section 7 (1) of the Criminal Law Amendment Act, in that on 19th July, 1962 at about 10-45 A.M. in the office of the Revenue Divisional Officer, Ariyalur, the petitioner and others formed themselves into an unlawful assembly at the entrance of the Revenue Divisional Office, Ariyalur, with the common object of obstructing the State Government officials from attending to their work and that in the course of the said agitation, squatted at the entrance of the said office obstructing the officials from going into the office. The accused admitted their offence and pleaded guilty. The Special Sub-Divisional Magistrate, Tiruchirapalli, who tried the case, accepting the plea of guilty, directed several accused to be released on executing a bond, but sentenced the petitioner to two months' R. I. on each of the counts. The charge-sheet discloses that the petitioner and others agitated against the Government to compel the Government to interfere with the rising of the prices of the commodities, and for that purpose formed themselves into an unlawful assembly with the common object of obstructing the staff of the Revenue Divisional Office from doing their duty and squatted on the verandah of the office and laid themselves on the entrance shouting slogans and refused to allow them to enter into the office. As already stated, the petitioner pleaded guilty and the offence so charged has been clearly made out. But the question is whether the offence would amount to moral delinquency. Section 25 of Act XXXV of 1958 disqualifies a person who has been sentenced by a criminal Court to imprisonment for any offence involving moral delinquency. The section does not disqualify all persons who are convicted by a criminal Court, but requires that the conviction should be for an offence involving moral delinquency. The word ' delinquent ' would mean an offender or a person who is guilty. Moral delinquency would, therefore, mean an act which would be offensive to the morals. It is neither desirable nor necessary to consider for the purpose of this case under what circumstances criminal offences would amount to moral delinquency. Confining the discussion to the facts of this case, the question is whether the agitation against the rise in prices of the commodities would amount to moral delinquency. It is also not disputed that, while agitating against the rise in prices, they obstructed the staff of the Revenue Divisional Office from attending to their normal duties. That it is an offence is not disputed, and the petitioner and others have been convicted and sentenced for it. To hold that the petitioner is guilty of moral delinquency some act which is offensive to the morals as normally understood, is necessary. An agitation against the rise in prices, whether justified or not, cannot be said to involve any moral turpitude. If in the course of the agitation any law is transgressed, the petitioner is liable to punishment That would not involve any moral delinquency. To hold otherwise would mean that the person involved in any form of agitation would be found guilty of moral delinquency.

Mr. Sundaralingam, learned Counsel for the first respondent, relied on a decision of this Court in *Chelladorai* v. *Sornam*[1], In that case the first respondent, who was sought to be declared as unqualified, was convicted and sentenced in a Sessions case for offence under section 120-B read with sections 109 and 121, Indian Penal Code and sections 4 and 5 of the Explosive Substances Act and sentenced to five years R I. The question was whether the first respondent in that case had served out his sentence, and stood for the election only after a period of five years from the date of release. As the petitioner did not establish that the first respondent was not released earlier than five years prior to the date of election, the matter was remanded for the purpose of enabling the petitioner to produce the records relating to the date of release of the first respondent. The Court itself observed that the order of remand would dispose of the petition, but proceeded to make certain observations regarding offences involving moral delinquency, which were *obiter* in nature.

1. (1964) 1 M L J. 55.

The case with which the Court was concerned in the above case was one of blowing up of a railway bridge and an offence under the Explosive Substances Act, a crime of very grave nature The acts are admittedly anti-social in nature involving moral delinquency This decision cannot have any application to the facts of the present case

On the facts of this case, it cannot be held that the petitioner was convicted for an offence involving moral delinquency The petition will have to be allowed

The Writ Petition is allowed with costs and the order of the Election Tribunal is quashed Counsel's fee Rs 150

V K — *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE M NATESAN

Ambalal . *Petitioner**.

Motor Vehicles Act (IV of 1939)—Section 116 and Penal Code (XLV of 1860), section 304-A—Rash and negligent driving—What constitutes—Duty of Court in appreciating the evidence

In cases of charge of rash and negligent driving it is very necessary that the Court must ward off and keep out of the popular prejudice or leaning for or against the motorist or the victim of the accident and examine the evidence on record in the light of dependable oral evidence which may be at least considered probable by the circumstances Cases where the driver of a motor vehicle should have anticipated or expected an event and had an opportunity to avoid it and avert an accident, but he could not do so due to his rashness or negligence in driving at an excessive speed in relation to the traffic or the locality, present no difficulty But in cases where the defence is that the brakes of the vehicle suddently failed and which was never anticipated or foreseen, it is the duty of the Court to examine the circumstantial evidence to find out if the defence is probable While rashness connotes acting in the hope that no consequences will follows though aware of the likelihood of such consequences, negligence means acting without the awareness that harmful or mischievous consequences will follow in such circumstances which show that had the person exercised the caution incumbent upon him he would have been aware of the consequences of his act Negligence has not been defined by the Penal Code But rashness or negligence in the context of the Code should be of the kind to endanger human life or likely to cause hurt or injury to any person Negligence has generally been understood as conduct which falls short of the standard of conduct ordinarily measured by what a reasonable man of ordinary prudence would do under the circumstances But the negligence that may give rise to a civil liability will not be enough for purposes of establishing an offence under section 304-A of the Penal Code

Where the driver of the vehicle put forward a defence that the brakes of his vehicle suddenly failed and in spite of his best efforts the vehicle could not be brought to a halt due to such sudden failure of the mechanism and such a version is probabilised by the existence of marks of brake fluid at the accident spot the accused should be given the benefit of the doubt and cannot be convicted for the offence of rash and negligent driving

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Fifth Presidency Magistrate, Egmore, Madras, dated 25th June, 1965 in C C. No 5994 of 1965

V Rajagopalachari for *A N Nagarajan* and *A Viswanathan*, for Petitioner

K A Panchapagesan, for the Public Prosecutor for State.

The Court made the following

ORDER —The petitioner has been convicted by the Fifth Presidency Magistrate Egmore, Madras, for an offence under section 304-A, Indian Penal Code and section 116 of the Motor Vehicles Act and sentenced to R I for six months under section 304-A, Indian Penal Code No separate sentence has been awarded under section 116 of the Motor Vehicles Act The case for the prosecution is that the petitioner on 15th April, 1965 rashly or negligently drove his car MSP 6788 at about 9-30 A M. on the Mount Road and knocked down one Dhandapani, aged 13 years who was riding a cycle The injuries sustained by the boy in the impact resulted in his death at about 9-45 A M

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*Crl R C No 695 of 1965 29th April, 1966.
(Crl. R P No. 487 of 1965)

Certain basic facts, which may be taken to be beyond controversy, may first be set out The scene of accident is on the Mount Road in the locality known as Round Tana between two pedestrian crossings which according to P W 7, Reserve Sub-Inspector attached to D-1 Traffic Station, is separated by a distance of about 125 feet There is a slight turn of the road there The cyclist was proceeding from south towards north at the extreme left side of the road The motorist was also proceeding in the same direction At about 50 feet from the northern pedestrian crossing, the front left portion of the car hit the rear of the cycle and the cyclist was thrown off and he fell on the cement railings fixed to the edge of the pedestrian platform The cycle also fell down and the car stopped after proceeding about 50 feet just at the northern pedestrian crossing P W 7 speaks to have witnessed the accident from a distance of 25 feet In the car of the petitioner, his two children were sitting by his side in front and it appears he was taking them to their school. It is seen from the record that the boy was immediately taken to the General Hospital and the Casualty Medical Officer, examined as P W 3, states that the boy was brought to the hospital by the owner of the car involved in the accident The petitioner immediately returned back to the scene of accident the boy dying in fifteen minutes There is no doubt that the boy died of the accident P W 4, who conducted the post-mortem, states that the injuries found on the body of the boy could have been caused by his being knocked down by a car and violently thrown off on any hard surface It is nobody's case that the car actually ran over the boy The impact of the car had thrown the boy and the cycle on the cement railings

The learned Magistrate, on an examination of the evidence, concludes that the petitioner could have avoided the boy being knocked down by his car and that he had not exercised the care in driving his car which the circumstances and situation demanded of him He would therefore hold him criminally liable for causing the death of the boy

It will be convenient to set out the statement of the petitioner at this stage. This is what he states

"After passing the pedestrian crossing in front of Chellarams in Mount Road (southern pedestrian crossing) I applied the brakes They did not act They had suddenly failed I had therefore to swerve and bring to a stop I was driving only cautiously On my right there were vehicles proceeding ahead coming along and behind my vehicle I therefore swerved a little to the left and switched off the engine After repeatedly applying the brakes the vehicles travelled a distance of a few feet and stopped on the western side of the road. Before coming to a dead stop it bumped against a cycle which was proceeding ahead and the cyclist and the cycle fell down "

In his statement, he denies driving the car at full speed and states that the accident was the result of sudden failure of the brakes He says he tried his best to avoid hitting against the cycle which was proceeding ahead of him

Among the eye-witnesses to the accident, reference may be made to the evidence of P W 1 and P W 2 P W 1 was sitting in the shop of one Venugopal at about the place of the accident He speaks to the boy proceeding on his cycle and the car coming behind and dashing against the rear wheel of the cycle which the boy was riding, opposite to the place where he was seated He states that the car then proceeded on to about 60 feet and came to a stop near the pedestrian crossing opposite to the Elphinstone theatre It is elicited from him that there was heavy traffic in Mount Road at 9-30 A M P W 2 is the proprietor of the shop outside which P W 1 was sitting His evidence also is to a similar effect so far as the accident is concerned. In corroboration of the statement of the petitioner that there was a sudden failure of brakes, D W 1 has been examined He is a partner of a hotel in the city who knew the petitioner for over twenty years On getting a telephonic call from the petitioner, he came to the scene of the accident at about 11 A M He speaks to the presence of brake fluid on the road in front of Kishinchand Chellaram (near the pedestrian crossing in the south) and states that the brake fluid had dripped to a distance of about 30 yards upto Ice Cream Parlour (the place where the car ultimately stopped) He speaks to the car having been towed in the evening to the Commissioner's Office A mechanic was examined as D W 2 to speak to the condition of the brakes, namely, that they were faulty and not in order He had attended

on the brakes after the accident But the learned Magistrate has not accepted his evidence It is needless to refer to the same P W 5 is the Motor Vehicles Inspector. He examined the car on 19th April, 1965, that is four days after the accident. He states that he found both the foot brake and hand brake efficient as required by the Act His evidence is that if the car had come to a stop after travelling a distance of 106 feet after the application of brakes, the speed of the car should have been 33 miles per hour I shall be referring to this part of the evidence later This officer admits that he did not open the braking system of the car, and did not observe the condition of the master cylinder, nor did he remember the system of the brake. He would state that he did not remember if the car was towed down to the traffic office.

P W. 7, who was on traffic duty at the spot about whom reference has been made already, states that the car did not stop after hitting the cycle, but proceeded on and stopped opposite to the Elphinstone theatre that is at the northern pedestrian crossing. He admits in cross-examination that the car was removed by pushing in to the traffic island He would state that he had no idea how the car was taken from that place afterwards He admits that the petitioner tried to stop the car and the petitioner might have tried to stop the car from the place of accident He did not notice any brake fluid at the scene of occurrence but he does not deny its presence P W 8, the Sub-Inspector of Police, Traffic Investigation, admits in cross-examination that the car was removed in the evening and that it was only towed

P W. 1, in the statement recorded from him at about 11 A M on the date of the accident, has stated that the person in the car applied brakes but that the car proceeded without stopping and halted in front of the shop, near about the northern pedestrian crossing.

The question for consideration is whether the death of the boy was caused by the rash or culpable negligence of the petitioner It is contended by learned Counsel for the petitioner, Sri V Rajagopalachari that the approach of the Magistrate to the consideration of the question is wholly faulty in that favourable aspects in the prosecution evidence are completely overlooked and ignored It is submitted that the defence case has not been examined in the light of the evidence adduced by the prosecution and that an unprejudiced examination of the prosecution evidence on record would completely corroborate the statement of the petitioner. Having been taken through the entire records, I find much force in this contention. In a case of this kind, when the life of a young boy is snuffed in a trice, very likely the mind gets prejudiced Quite often and generally if the bystanders are illiterate the prejudice is against the motorist The behaviour of the motorist may also provoke it. Occasionally if there happen to be knowledgeable persons there is a tendency on their part to become biased in favour of the unfortunate motorist, with woe begone countenance who may not harm or think of hurting a fly This prejudice is often reflected in the evidence and may even invade the examination of the culpability of the accused unless one is wary, and colour the judicial vision In cases of this kind, it is therefore very necessary that the Court must ward off and keep out of this prejudice and examine the evidence on record in the light of circumstantial evidence and probabilities and dependable oral evidence, which gets probabilised by circumstances We have to start examining the evidence in this case with one premises, that it is not the case of the prosecution that the motorist started on his drive with brakes which were patently defective taking a chance of there being no accident Nor do I find from the record of the case that the motorist has by excessive speed disabled himself from putting up and bringing the vehicle to a stop to prevent the accident It is not a case where the boy darted in front of the vehicle and the motorist who should have expected it and who had an opportunity to avert it by applying brakes, failed to do so or could not avert the accident by reason of excessive speed in relation to the locality Here is a case where the motorist hits the cycle on the extreme left of the road from behind We have, therefore, to consider whether the version of the accident as given by the petitioner is likely or probable The question for examination is whether the facts and circumstances emerging from the

evidence establish or at least probabilise the version of the petitioner, or whether they are wholly inconsistent with the version of the petitioner that his version must be discarded as puerile, improbable or false. Now what is the case of the motorist-petitioner? His case is that the failure of brakes was sudden and totally unforeseen, noticed just before the accident and that he acted in a manner in which one could be expected to act in such circumstances He switched off the engine and swerved to the left and proceeded as cautiously as possible He applied the brakes which of course did not act. In spite of his efforts, his car had hit against the cycle going in front and the boy was thrown off The plea is that from the moment the brakes failed he was an involuntary actor having no control over the vehicle. It was a perilous and unfortunate position in which he found himself not by any act or omission of his, not from any want of circumspection on his part The prosecution version is seen from the evidence of P W 7 P W 7 would state that the car was proceeding from south to north in good speed I am unable to understand what he meant by good speed in the context unless it be that there was no perceptible slowing down The witness is a Reserve Sub-Inspector attached to the Traffic station Does the witness mean by that expression that it was excessive speed or speed which ought not to have been taken in that locality? This is not made clear. But we shall examine his evidence in the light of the evidence of P W 5. As already stated, P W 5 categorically states that if the car had come to a stop after travelling a distance of 106 feet after the application of brakes, the speed of the car should have been 33 miles per hour But the distance, from the scene of impact to the place where the car had stopped, is according to P W 7 about 50 feet and according to P Ws 1 and 2, about 60 feet More or less we may take it as 50 feet Thus the brakes in this case if they were acting must have been applied about 66 feet before the accident had happened This takes us more or less to the spot opposite to Kishanchand Chellaram, a few feet off the southern pedestrian crossing If the evidence of P W. 5 is accepted, it comes to this that the brakes had been applied to this car immediately after the southern pedestrian crossing That is the version of the petitioner in his statement with this addition that the brakes failed to act. The road there was taking a slight turn One pedestrian crossing had been passed and another pedestrian crossing was in front, there was heavy traffic Very likely the motorist applied the brakes, then it may be in the usual course of driving He could not have been going very fast at the pedestrian crossing Even if he had, he would have applied brakes 60 feet from the scene of accident We find on the evidence of P W. 1 and P W 7 that the motorist applied brakes immediately after the accident In fact, P W 7 states that the petitioner tried to stop the vehicle The vehicle had not stopped If these facts are read in the light of the evidence of P W. 1 and the presence of brake fluid on the road it probabilises the case of the petitioner that when he applied the brakes first he found suddenly that they had failed I have not been shown any piece of evidence on the side of the prosecution which improbabilises this statement of the accused The learned Public Proseuctor would have me discard the statement of P W 5 that the car must have travelled 106 feet before it came to a stop and also the statement of P W. 7 that he remembered the petitioner trying to stop the vehicle I see no reason for such a course except that they are favourable to the accused Apart from these features there is one other aspect to be considered The car had been towed from the place where it had stopped to the parking island in the locality This might be ignored But from the parking island to the Commissioner's office in the evening the car was towed P W 8 states that on suspicion it was towed How did the suspicion arise? Possibly an attempt must have been made to run the car and the brakes must have been found defective Strong reliance is placed on the deposition of P W 5 that the brakes were found efficient as required by the Act Comment on this piece of evidence by learned Counsel for the petitioner is that the examination by P W 5 was on 19th April, 1955 Whatever it might be, he cannot explain and the suggestions in the cross-examination of P W 5 is to make out that either the examination was perfunctory or the identity of the car was not maintained The fact remains that there must have been failure of the brakes on 15th April, 1965 at about 9-30 A M, when they were applied immediately after the southern pedestrian crossing. Some of the features noticed are

consistent only with the theory of sudden failure of brakes It is found in the evidence of P W 1 and of P W. 7 that the petitioner did apply brakes P W 5 also states that if brakes had acted, skid marks must have been found on the road He also admits that there should be skid marks if brakes were applied and the car travelled to a distance and then stopped Now we have one or other of two alternatives in this case Either the brakes had been applied and they had acted or the brakes had been applied and they did not act at all If the brakes had acted, there must be skid marks Nobody speaks to the presence of skid marks on the road It is likely therefore that the brakes had been applied and they did not act at all This is in conformity with the case of the petitioner P W 7 has stated that he whistled to the petitioner as the car was running in good speed and that he remembered that the petitioner was trying to stop the vehicle Though on behalf of the petitioner, it is suggested that he did not whistle, I am prepared to accept the statement of P W 7 that he whistled to the petitioner to stop the car It is likely that he would have whistled when he found that the car had not stopped after the accident and was proceeding He would not have been aware of the difficulties in which the motorist was placed and his inability to stop the car The next answer brings out of P W 7 in a way the case of the petitioner P W 7 states that the petitioner might have tried to stop the car from the place of the accident On the above discussion of the evidence for the prosecution and in the circumstances made out, it is a reasonable inference that the petitioner's explanation must be true and that there was a sudden unanticipated and unforeseeable failure of brakes

The question then for consideration is whether it can be said that the petitioner caused the death of the boy by doing a rash and negligent act so as to constitute an offence under section 304-A, Indian Penal Code Is the accident consequent upon any culpable rashness or criminal negligence on the part of the petitioner, is the question for decision While rashness is acting in the hope that no mischievous consequences will ensue though aware of the likelihood of such consequences, negligence is acting without the awareness that harmful or mischievous consequences will follow, but in circumstances which show that had the actor exercised the caution incumbent on him he would have had awareness of the consequences of his act. Negligence, as such, had not been defined in the Indian Penal Code, however, we get an idea of the degree of negligence that would make the act criminal if we refer to the words of section 279 of the Penal Code, namely, "whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person. . " Rashness or negligence should be of the kind to endanger human life or likely to cause hurt or injury to any other person Negligence in this context has generally been understood as conduct which falls below the standard established for the protection of others against unreasonable risk of harm—the standard of conduct ordinarily measured by what a reasonable man of ordinary prudence would do under the circumstances. I would put it, the standard of negligence must be rated in terms of the circumstances, to be such as would be accepted as criminal negligence by an intelligent and sensitive community. Is there callous disregard of consequences or a lack of elementary caution or ordinary circumspection? But the negligence that may give rise to civil liability will not be enough for the purpose of establishing the crime under section 304-A, Indian Penal Code

There has been no negligence on the part of the boy He has not contributed in any way to the accident We have therefore to consider could the motorist in this case have avoided the accident by any precaution which he could have taken ahead, or at or before the moment of collision acting as a reasonable man On the evidence which has been considered by me, no act or omission has been suggested which the man at the wheel could have taken or made, that would have avoided the accident in the instant case

In the circumstances, learned Counsel for the petitioner is perfectly justified in the comment that he has made on the judgment of the learned Magistrate. Rightly it is contended that the tell-tale features which are in favour of the petitioner have been ignored It must be noticed that the learned Magistrate does not dis-

credit D W 1 when he states that brake fluid was seen on the road What the Magistrate would say is that having rejected the evidence of D W 2, the evidence of D W 1 could not be relied upon conclusively to hold that the patch and the drops were of the brake fluid Again and again, overlooking material evidence, the Magistrate would remark that P W 5 had stated that the car was mechanically perfect and the brakes were in order The evidence in the prosecution version which probabilises the petitioner's case is substantial, at any rate the petitioner is entitled to the benefit of doubt which to say the least is present It is not contended as it cannot be, that if there is a sudden and unforeseeable mechanical breakdown not related to any rashness or negligence on the part of the driver as a result of which the event happens, the case would fall under section 304-A, Indian Penal Code

In the above circumstances, I hold that it has not been made out that the accused is guilty of an offence under section 304-A, Indian Penal Code No offence under section 106 of the Motor Vehicles Act is proved The conviction and sentence of the petitioner are therefore set aside and the petitioner is acquitted The revision is allowed. The bail bond will stand cancelled

Revision allowed; conviction set aside.

R M

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction)

PRESENT —MR M ANANTANARAYANAN, *Officiating Chief Justice* AND MR JUSTICE P RAMAKRISHNAN

N Varadappa Naicker .. *Appellant**

v

State of Madras represented by the Secretary to the Government, Revenue Department, Fort St George, Madras and another . *Respondents.*

Land Acquisition Act (I of 1894), sections 4 (1) and 5-A—Acquisition of land for public purpose—Scope of interference by Court.

The exercise of the power of 'Eminent Domain' by the State is a discretion vested in the State which has to be used *bona fide* and in public interest It is not within the province of a Court to canvass the purpose of the acquisition unless *prima facie* there is some ground for holding that the particular acquisition is outside the power of ' Eminent Domain ' Allegations of *mala fides*, colourable exercise of power etc are not to be assumed because the affected person finds the acquisition inconvenient to him That the land in question is not suitable for the purpose or that alternative sites are available for acquisition are matters to be considered by the authorities on objection at the stage of enquiry under section 5-A of the Act

That the land is more valuable as an agricultural land and is already devoted to cultivation is a factor which might be considered by the authorities in their discretion and a Court cannot dictate the choice to them

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr Justice Kailasam dated 6th April, 1966 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No 918 of 1966 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for all the records of the respondents herein relating to the acquisition of the petitioner's lands in S P Nos 72 and 82 in No. 145, Valiyer Village, Kancheepuram of the extent of 73 cents commencing with the notification under section 4 (1) or the Land Acquisition Act in pursuance of G O.Ms No 3094, Revenue, dated 7th November, 1953 and ending with Notice of Award under section 12 (2), dated 22nd January, 1966 of the said Act and quash the proceedings therein.

O Radhakrishnan, for Appellant.

The Judgment of the Court was delivered by

Anantanarayanan, O C J—This is an appeal from the judgment of Kailasam, J , in W P. No 918 of 1966, which related to the acquisition of certain lands of the petitioner (appellant) in S P Nos 72 and 82 in S No 145 of Vel yoor Village, Kancheepuram Taluk, for the declared public purpose of an extension to a Harijan Colony In seeking the interference of this Court in exercise of its powers in writ jurisdiction, the petitioner (Appellant) affirmed in an affidavit that (1) the acquisi-

* W A. No 106 of 1966 21st June, 1966.

tion was not a 'public purpose' within the meaning of section 4 (1) of the Land Acquisition Act, (2) that it was an infringement of the fundamental right of the petitioner under Article 19 (1) (*f*) of the Constitution, and (3) that, in any event, the acquisition was *mala fide*, being a colourable exercise of power the land was not suitable for the public purpose, as it was lower in level than the existing colony, and separated therefrom by a channel There were alternative sites that were even more suitable for the same purpose, and extraneous and irrelevant factors had influenced the authorities in the initiation of proceedings The learned Judge (Kailasam, J) was of the view that there was not a single tenable ground upon which the proceedings of acquisition could be fairly impugned In effect he dismissed the writ proceeding *in limine*

We have carefully considered the arguments of the learned Counsel for the appellant, who has attempted to persuade us into admitting this appeal and we are equally unable to see any valid basis for a conceivable interference in writ jurisdiction As is well known, the exercise of the power of Eminent Domain by the State is a discretion vested in the State, which has to be used *bona fide* and in the public interest. But once that decision has been taken it is not the province of the Courts to canvass the purpose of the acquisition, as a 'public purpose' or otherwise, unless *prima facie*, there is some strong ground for holding that the particular acquisition is outside the power of Eminent Domain

Equally, a ground of attack such as '*mala fides*' or a colourable exercise of power by the concerned authorities, is not a mere formula which can be used by the affected party because he finds the acquisition inconvenient or one which Courts will accept on such an imputation being advanced with no other support On the contrary, these are very specific grounds of attack, and facts must be alleged which will at least render it likely or probable that the exercise of the power has been *mala fide* or colourable *vide* the observation of this Court in *Gangadara Mudaliar* v *State of Madras*[1] a Judgment to which one of us was a party. Precisely as in that case, here also, the words of that decision are strictly applicable :

"There is no colourable exercise of power for the simple reason that there is nothing to show the intrusion of any ulterior object"

Learned Counsel has pressed before us the difference in levels between the proposed site and the existing colony, and also the availability of alternative sites. These matters were before the authorities, in the form of objections urged by the party at stage of the enquiry under section 5-A of the Act and, presumably, they have been fully considered The authorities, have been satisfied, after such consideration, that it is essential to acquire the land of the petitioner for the purpose of the Harijan Colony It is indisputable that these lands, practically adjoin the existing colony, with only a channel separating them, and we must assume that if alternative sites elsewhere had been more suitable, the authorities would have decided differently On these grounds there is no room for interference.

Finally, it is strenuously contended that the existing user of these lands, namely, for agriculture, is far more valuable than the use to which the lands are intended to be put by the acquisition; hence it is argued that in the prevailing economic situation, the Court should interfere to preserve the present user of the land This is eminently a matter for the revenue authorities to decide and, indeed, it is not the province of the Court to decide upon the question whether the acquisition should be proceeded with, or should be abandoned, because in a time of economic stress the land proposed to be acquired is already devoted to agriculture. Even now, if that factor should weigh with the authorities, they may consider the abandonment of this acquisition, and the acquisition of some alternative site But this is a matter within their discretion, and the judgment of the Court cannot dictate the choice. With these observations and agreeing with the learned Judge in his view that there is no room for interference in writ jurisdiction we dismiss the appeal.

R M ——— *Appeal dismissed.*

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1 (1965) 1 M L J 374 at 378.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

PRESENT :—MR M ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE P RAMAKRISHNAN

The Corporation of Madras, represented by its Commissioner and another .. *Appellants**

v.

Messrs The Oriental Mercantile Company, Limited, Madras . *Respondent*

Madras City Municipal Corporation Act (IV of 1919), *section* 129-A (*e*)—*Exemption from tax on advertisements on railway station—Scope of*

A railway station is not merely the booking office the platform or the waiting rooms attached thereto but includes all the space comprised within the compound of the premises Hence where an advertisement has been exhibited on a wall which is the property of the railway and which does not front any street but only fronts the compound or enclosure of the railway premises, it will certainly be within the exemption clause (*e*) of section 129-A of the City Municipal Corporation Act It is only an advertisement affixed to the outer compound wall itself, which may be said to conceivably front the street, that might fall outside the exemption

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr Justice Srinivasan dated 18th January, 1966 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No 299 of 1963 presented under Article 226 of the Constitution of India to call for the records pertaining to the notice of warrant of distraint dated 13th March, 1965 in relation to Bill No R D C No G-5/33189/61 of the Corporation of Madras, served on the petitioner on 16th March, 1963 and to issue a writ of prohibition, prohibiting the respondents from distraining the movable properties of the petitioners with a view to collecting the illegal demand for payment of advertisement tax

T Chengalvaroyan, for Appellant

The Judgment of the Court was delivered by

Anantanarayanan, C J—There is only a simple ground of the interpretation of a statute, involved in this writ appeal though, indisputably, it possesses a measure of interest, the only authority that has any bearing, direct or indirect, on the concerned issue is an English decision We may take it that the writ appellant, which is the Corporation of Madras represented by its Commissioner and Revenue Officer, desires to contend that the advertisement or hoarding displayed at the outer wall of the main building of a railway station, is not entitled to the exemption enacted in section 129-A, sub-clause (*e*) of the City Municipal Corporation Act (IV of 1919). We may immediately set forth that sub-clause which is in the following terms .

" *Section* 129-*A*—Provided further that no such tax shall be levied on any advertisement which is not a sky-sign and which

. .

(*e*) is exhibited within any railway station, or upon any wall or other property of a railway company except any portion of the surface of such wall or property fronting any street "

The learned Judge (Srinivasan, J) was of the view that the exemption claimed by the advertiser in this case fell within the scope of the first part of the sub-clause itself He pointed out, and certainly we think with some force and justice, that " a railway station is not merely the booking office, the platform or the waiting rooms attached thereto, but includes also all the space comprised within the compound of the premises ".

The learned Judge then proceeded to refer to the dicta in *South Eastern Railway Company* v. *Railway Commissioners*[1] Part of that judgment is in the following terms

" So as to a 'station,' the term is not in ordinary sense used as a description merely of the actual existing structures at a station, but as the description of a space actually set apart for, and generally used as, a resting place for traffic or a place for dealing with it in a particular way "

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* W A No 100 of 1966 5th July, 1966

1 (1881) 6 Q B 586

Earlier, in this same judgment, it is pointed out that terms like " railway " and " railway station " are not mere legal terms, they are the descriptions in ordinary phraseology of well-understood things of a particular kind In the view of the learned Judge, therefore, a railway station will certainly include buildings in the compound or enclosure, and the outer wall of a main building will be within the definition Hence, if a bill of hoarding or advertisement is affixed to the outer wall, it will ordinarily fall within the terms exhibited within "any railway station" in section 129-A, sub-clause (e) But the matter does not entirely end there, for the reason that the statute uses the explicit language " is exhibited *within* any railway station "

It is at least arguable that the exhibition might have to be within the walls of the building (intramural), and not on the outside walls But this apart, the exhibition in this case indisputably falls within the second clause also The advertisement has been exhibited on a wall which is the property of the railway company, which certainly does not front any street These outer walls front the compound or the enclosure, and it is quite conceivable in a case that the compound wall may itself be high enough to exclude the view of the advertisement by pedestrians passing in the street It is only an advertisement affixed to the outer compound wall itself, which may be said to conceivably front the street, and therefore which might fall outside the ambit of the definition

Sri Chengalvorayan contends that the two clauses of section 129-A, sub-clause (e) should not merely be read as disjunctive, which he concedes they are, but that they should also be read as mutually exclusive of each other For this latter interpretation, we cannot find any justification in the language used Under the circumstances, we see no reason whatever for taking a different view from that of the learned Judge (Srinivasan, J) on the liability of the advertisement to tax In this case, it falls within the exemption, and it is not liable to be taxed by the authorities of the Corporation

This writ appeal is dismissed No order as to costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K S VENKATARAMAN

M S. Pugalagiri Nadar & Sons, through its Managing Partner Sri S P Muthu . *Petitioner**

v

The Union of India, through the General Manager Southern Railway, Madras .. *Respondent*

Railways and Carriers—Damage to goods—Claim for compensation—Duty to prove actual loss on account of the damaged condition of the goods

Where a person claims compensation for loss on account of his goods getting damaged due to the negligence of the carrier, it is incumbent upon him to establish by evidence that he had been put to actual loss by reason of such damage The mere fact that the carrier admitted that damage has been occasioned cannot entitle the plaintiff to get a decree for compensation unless he proves actual loss The measure of damages in such cases will be the difference between the original value of the goods and the value for which the damaged goods were sold Where the goods is completely damaged and is useless the consignee may reject the same and claim the entire loss Where the damaged goods were admittedly sold and it is not established that it was sold for any lesser value no question of compensation for the damage could arise

Petition under section 115 of Act V of 1908, praying High Court to revise the decree of the Court of the Subordinate Judge, Madurai, dated 5th January, 1965, and passed in A S No 163 of 1964 (O S No 290 of 1963 District Munsifs Court Madurai Taluk)

K S Naidu and *A Venkatachalam*, for Petitioner

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*C R. P. No. 574 of 1966 12th July, 1966.

The Court delivered the following

JUDGMENT —This revision petition under section 115 of the Code of Civil Procedure arises out of a suit O S No 290 of 1963 filed in the Court of the District Munsif of Madurai Taluk for recovery of a sum of Rs 755 67 P 230 bags of sugar were consigned to the plaintiff from Bijnar in northern India to the railway station at Dindigul where the plaintiff resides On arrival at Dindigul 46 bags were damaged and there was also some shortage The damage was assessed by the railway authorities at 10 per cent in the case of 34 bags and at 5 per cent in the case of 12 bags The plaintiff filed the suit for damages representing (1) shortage and (2) damage The defence of the railway was that they were not negligent. The learned District Munsif who tried the suit however, found that the railway had been negligent, but he gave a decree only respect of the shortage He declined to pass a decree in respect of the damages on the ground that the plaintiff had not let in any evidence to prove that he actually sustained any loss in respect of the damaged bags The plaintiff preferred an appeal which was heard by the learned Subordinate Judge He allowed the appeal to a small extent in respect of shortage by adding the proportionate freight which the plaintiff had paid But he confirmed the decree in respect of the damage on the same ground as the learned District Munsif had done.

In this revision petition, Sri K S Naidu, the learned Counsel for the petitioner-plaintiff agrees that the plaintiff has not let in any evidence about the price at which he was able to sell the damaged sugar In particular he has not proved that the price which he was able to secure was less than the cost price of the quantity of sugar involved But the learned Counsel contends that in spite of this lack of evidence on the plaintiff's part, the plaintiff is entitled as a matter of right to recover from the railway damage on the basis of their own estimate, namely, 10 per cent of the cost price of 34 bags and 5 per cent of the cost price of 12 bags.

I have very little doubt that the contention is untenable and that the Courts below are right in their view that the plaintiff can claim damage only if he has proved that he sustained any actual damage For instance let us assume for the sake of argument that in this case itself the petitioner has been able to realise by the sale of the damaged sugar more than what it cost him I do not see any reason in principle or justice as to why he should be permitted to recover anything from the railway. If he had consumed the sugar himself it might have been a different matter, but there is no such suggestion

The learned Counsel has cited some passages from Kameswara Rao's Law of Damages and Compensation, fourth edition, Volume II, note 138 at page 1038 and Lahiri's Law of Carriers, page 129 and also a decision of the Madhya Pradesh High Court in *Union of India* v *Haji Latif Abdulla*[1] There is nothing in the passages from the text books covering the point under discussion, and the decision cited indeed contains some observations which coincide with my view The passage in Kameswara Rao's book is this :

" Where goods are delivered by a carrier in a damaged condition for which the carrier is not protected, the measure of damages is the difference between the original value and the value when damaged, and where the goods are completely useless, the consignee may reject the goods, and claim as for a complete loss "

Some decision is cited which is not traceable The passage in Lahiri's Law of Carriers also is the same It is implicit in the above passage that the plaintiff has not been able to recover anything more than the value when damages Turning to the decision cited, namely, *Union of India* v *Haji Latif Abdulla*[1], it was a case where some cloth was delivered by the railway in a damaged condition The plaintiff appropriated the cloth to his own use Damages were awarded to him by the Small Cause Court on the basis of the assessment of the damage by the railways The railway filed the revision petition A plea of limitation was raised and the revision petition was allowed on the point of limitation But the learned Judge,

1 A I R 1961 M P 190

Tare, J, endorsed the basis of the assessment of damage by the trial Court with the following observation

"The hessian cloth and the suth were appropriated by the plaintiff to its own use Therefore, the plaintiff could claim damages on the basis of the percentage of the damage to the goods Had the plaintiff sold the cloth and suth to some third person, in that case alone, the plaintiff would be required to prove as to what price was fetched But the plaintiff in the present case, not having sold the cloth was not required to prove what price was fetched Therefore, the basis adopted by the learned Small Cause Judge cannot be said to be erroneous, or illegal"

In this case admittedly the sugar was sold and hence even according to the observations in the above decision it was incumbent on the plaintiff to prove that he actually sustained some loss

In the result, there is no reason for interference, and the petition is dismissed

R M. — *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE R SADASIVAM

S. Antony . *Appellant**

v.

G S Naidu . *Respondent.*

Evidence Act (I of 1872), section 126—Privilege in respect of professional communication—Scope of.

The privilege in respect of professional communication between a client and his Advocate is intended only to protect the interest of the client in respect of any action of prosecution for any prior act or offence The privilege is not intended to cases of commission of any offence The law presumes that an advocate acts in discharge of his duty in pursuance of the instructions of his client and the protection given under section 126 of the Evidence Act is restricted by the provisions contained in the section itself A defamatory imputation about a person in the instructions to an Advocate will not be a privileged communication

Appeal under section 417 (3) of the Code of Criminal Procedure, 1898 against the acquittal of the aforesaid respondent (accused) of offences under section 500 of Indian Penal Code by the District Magistrate (J.), North Arcot at Vellore in C C No 141 of 1963 on his file.

A Viswanathan, for Appellant.

M S Sethu, for Respondent

K A Panchapakesan, for the Public Prosecutor for State

The Court delivered the following

JUDGMENT.—Appellant S Antony retired from the Army as a Captain. In the course of his giving evidence in a defamation case against him and others he was cross-examined by P W 4, Sri V N Narasinga Rao, Advocate for accused in this case, and two defamatory questions were put to him, namely, that he ran from the operation field in 1943 and came to India, on foot and that as the President of Ex-Servicemen Club, Vellore, he misappropriated the radio, blanket and cot belonging to the Club The learned District Magistrate rightly found that these suggestions made to the appellant were defamatory and that the accused was not entitled to either *Exception* (1) or *Exception* (9) to section 499, Indian Penal Code, claimed by him The first suggestion really means that the appellant was a deserter. There can be no doubt that the two suggestions are clearly defamatory.

Learned Advocate for the accused made a feeble attempt to show that the defamatory statements were true But I see no reason to differ from the finding of the learned District Magistrate that there is no basis for the accusations made against the appellant and that the justification by truth could hardly be invoked on the facts in this case.

The main question argued in this appeal is whether the conviction could be sustained on the evidence of P W 4 in view of the privilege conferred under section

*Crl A No 900 of 1964 22nd July, 1966.

126 of the Evidence Act in respect of communications made by a client to his Advocate The records do not show that any such privilege was claimed when P W 4 came to give evidence It should be noted that the privilege under section 126 of the Evidence Act could be waived by the express consent of the client But as there is no proof of any express consent in this case, I shall deal with the decisions relied on in this case

The decision in *Palaniappa Chettiar* v *Emperor*[1], has been relied on by the District Magistrate in his judgment The accused in that case was charged with defamation because his vakil put a defamatory question to the complainant and the vakil gave evidence that he did so on the instructions of his client and the accused was convicted The conviction was set aside in revision on the ground that the instructions of the client to the vakil were inadmissible and the charge could not be sustained This decision has been dissented from in *Ayeesha Bi* v *Peerkhan Sahib*[2], I entirely agree with the views expressed in the latter decision As stated in Odgers' Law of Libel and Slander, 6th Edition, page 197 the law presumes that an Advocate acts in discharge of his duty and in pursuance of his instructions This principle has been referred to in In *re Devaraja*[3], though it was held therein that the mere presumption is not at all conclusive and for convicting a person for a criminal offence, far stronger evidence will be required than such presumption alone But the additional evidence required is afforded by P W 4, Sri V N Narasinga Rao, Advocate, for and the reply sent by him to the notice sent by the appellant's Advocate prior to the filing of the complaint

Further, it is clear from section 126 of the Indian Evidence Act that the privilege in respect of professional communications is intended only to protect the interests of a client in respect of any action or prosecution for any prior act or offence The privilege is not intended for committing any offence

In *K C Sonrexa* v *State of U P*[4], it was held that the right given to a client under section 126 of the Evidence Act is restricted in its operation to the purpose of defending him or presenting his case and the protection extends no further and that it is restricted in its scope by the two provisos contained in the section itself It was held in that decision that the defamatory imputation in the instructions to the Advocate would not be a privileged communication as the case would fall under proviso (1) to section 126 of the Evidence Act Taking the facts of the present case, if the accused wanted to commit the offence of defamation by putting the defamatory questions through his Advocate P W 4 he cannot obviously claim any privilege under section 126 of the Evidence Act having regard to proviso (1) of that section

It is clear that the privilege of a party to make a defamatory statement in proceedings in Court or to make defamatory suggestions to witnesses is not an absolute one under the Indian Peanal Code, as the *First Exception* requires that it should be true and for the public good and the other Exceptions require good faith as defined in section 52, Indian Penal Code For the foregoing reasons, the accused, who made the false accusations without any good faith, cannot claim the privilege under section 126 of the Evidence Act

The acquittal of the accused by the District Magistrate is totally unjust and it is set aside The accused is found guilty of defamation The records do not disclose that there was any prior conviction against the accused, who has also retired from military service The offence in this case took place is August, 1963 and I am convicting the accused after setting aside the wrong order of acquittal in his favour Having regard to all these facts, it is sufficient to admonish the accused and he is accordingly admonished through his advocate

R M — *Appeal allowed; accused convicted*

1 (1935) M W N 460
2. (1954) Crl L. J 1239, 1250
3 (1955) M W N Crl 133
4 A I R 1963 All 33 at 37

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE K S VENKATARAMAN.

Chinnappa and another .. *Petitioner* *

Criminal Procedure Code (*V of* 1898), *sections* 337 (1) *and* 435 *and* 439—*Tender of pardon under—Procedure—Interference in revision*

Normally the High Court will not interfere with the exercise of the power of tendering pardon by the lower Court Section 337 (1) of the Code expressly authorises a Magistrate of the First Class to tender pardon to any person in order to get a full and true disclosure of the circumstances within the knowledge of such person relative to the offence under investigation An order tendering pardon to a person on the basis of the statement made by him relating to the offence before another Magistrate under section 164 of the Code will be in compliance with the statutory requirements There is nothing in the Code which compels a Magistrate tendering pardon to examine the person again in full and record his confessional statement again when he is satisfied that such person has already made a true and full disclosure of the circumstances

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Judicial Second class Magistrate at Tiruttani, dated 30th July, 1966 and made in Crl M P No 506 of 1966 in P R C No 6 of 1966.

R Natarajan for *Jan & San* and *K Santhanam*, for Petitioner

S R Srinivasan, for Public Prosecutor on behalf of the State

The Court made the following

ORDER.—In Crime No 101 of 1966 of Tiruttani Police Station three persons, Chinnappa, Aruldoss and Krishnan, were charged for the murder of one Gopal. The confessional statement of Krishnan was recorded by the Sub-Magistrate, Kancheepuram, on 9th March, 1966 Subsequently on 17th June, 1966, when the matter was still under investigation pardon was tendered to Krishnan by the Executive First class Magistrate, Tiruvellore, acting under the proviso to section 337 (1) of the Code of Criminal Procedure. Krishnan was sought to be examined as P W 1 in the preliminary enquiry conducted under Chapter or XVIII the Code of Criminal Procedure by the Judicial Second-class Magistrate, Tiruttani Objection was taken to this by the other two accused, Chinnappa and Aruldoss, on the ground that the tender of pardon was invalid, because the Executive First-class Magistrate, Tiruvellore, who tendered the pardon had himself not examined Krishnan and recorded his statement but had merely relied on his prior confessional statement made on 9th March, 1966, before the Sub-Magistrate, Kancheepuram This objection was overruled by the learned Judicial Second-class Magistrate, Tiruttani This revision case has been filed against that order

Section 337 (1) of the Code, so far as it is relevant, says that any Magistrate of the First-class may, at any state of the investigation with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned or privy to the offence, tender pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof Sub-section (1-A) states that every Magistrate who tenders a pardon under sub-section (1) shall record the reasons for so doing

In this case, the learned Executive First-class Magistrate' Tiruvellore, after stating the facts says

> " I believe the statement made by him (Krishnan) before the Sub-Magistrate, Kancheepuram, on 9th March, 1966, under section 164, Criminal Procedure Code, contains a true and full disclosure of the whole circumstances within the knowledge relative to the offence and the offender I consider that the evidence of approver is necessary to prevent the escape of the offenders from punishment and that it is necessary to tender pardon to the accomplice Krishnan for the purpose of obtaining evidence in this case to bring the offender to justice "

In my opinion, this order of the learned Magistrate complies with the statutory requirements which I have quoted already There is nothing in the Code to

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*Crl R C. No 1026 of 1966 16th August, 1966.
(Crl. R P. No 1007 of 1966)

compel the Magistrate tendering pardon to examine the person proposed to be pardoned in full and to record his whole confessional statement again The Executive First-class Magistrate was satisfied that he (Krishnan) had made a true and full disclosure of the circumstances He probably put some questions to Krishnan and satisfied himself Sri R Natarajan, learned Counsel for the petitioners, has not been able to cite any decision in support of his contention, that the Executive First class Magistrate should once again have recorded the statement of Krishnan in full The two decisions cited by him, namely, *A J Peiris* v *State of Madras* [1], and *State of A P* v. *Ganeswara Rao* [2], do not touch this point.

The other decision cited by him, *Kashinath Krishna Sapat* v *State of Mysore* [3], lays down the criterion that the Magistrate tendering pardon should not lightly grant the pardon in a case where the remaining evidence is itself sufficient to sustain the conviction against the other accused I may observe that normally this Court will not interfere with the exercise of the power of tendering pardon However, I have ascertained from Sri S R Srinivasan, appearing for the learned Public Prosecutor, what the remaining evidence againt the accused Chinnappa and Aruldoss is. So far as Chinnappa is concerned there is no doubt his confessionl statement and so far as Aruldoss is concerned, there is no such confessional statement It is undesirable to pronounce even a tentative opinion on the adequacy or otherwise of the remaining evidence It is sufficient to say that I am not satisfied that this is a case where I should interfere with the tender of pardon The petition is accordingly dismissed

R.M. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE P RAMAKRISHNAN

Public Prosecutor .. *Appellant**

v.

K Ramachandra Chettiar .. *Respondent*

Madras General Sales Tax Act (I of 1959) sections 16 and 45 (2) (a) and Madras General Sales Tax Rules, rule 26 (16)—Prosecution for wilful submission of false returns—If could be launched in respect of suppression after the lapse of five years after the relevant accounting year

It is no doubt true that section 16 of the Madras General Sales Tax Act, 1959 prescribes a period of limitation of five years for assessing escaped turnovers and a similar time limit is prescribed under Rule 26 (16) of the Sales Tax Rules during which an assessee is obliged to preserve his account books But these provisions cannot be construed to mean that there is an automatic bar for a prosecution under section 45 (2) (*a*) of the Act in respect of an offence of wilful submission of a false return in respect of a period prior to five years, the time limit prescribed under section 16 and Rule 26 (16) Where the discovery of the inaccuracies of suppression was after a lapse of five years a prosecution can be launched under section 45 (2) (*a*) of the Act

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused in C T No 128 of 1963) of offence under section 45 (2) (*a*) of the Madras General Sales Tax Act, 1959 by the Fifth Presidency Magistrate, Egmore, Madras in his judgment dated 17th April, 1964, in C T No 128 of 1963 on his file

K Panchapakesan, for Public Prosecutor, the Appellant

N M Manivarma, for Respondent

The Court delivered the following

JUDGMENT —These two appeals are filed by the State of Madras against the acquittal of the same accused person in C T Nos 128 and 129 of 1963 on the file of the Fifth Presidency Magistrate, Madras On 1st September, 1963, the Special Deputy Commercial Tax Officer (Detection) South Madras on inspection of the place of business of the accused recovered certain rough account slips and bills From a perusal of these documents, the Deputy

1 A I R 1954 S C 616

2 (1964) 3 S.C.R 297 A I R 1963 S C. 1850

3 (1964) M L J (Crl) 8

*Crl. A Nos 748 of 1964 & 777 of 1964 — 17th August, 1966.

Commercial Tax Officer came to the conclusion that for the assessment years 1956-57 and 1957-58 respectively the dealer had made suppressions of turnover to the extent of Rs 1,30,857 and Rs 1,81,018 respectively It was alleged that in the returns of turnover prescribed under the Madras General Sales Tax Act, 1959, the above amounts were not included, that the omission was wilful and that as a result the dealer is liable to prosecution under section 45 (2) (*a*) of the Madras General Sales Tax Act, 1959 Two charge-sheet were filed for the failure to submit correct returns for 1956-57 and 1957-58 respectively

Section 45 (2) (*a*) of the Madras General Sales Tax Act of 1959 reads thus

" Any person who wilfully submits an untrue return or, not being already an assessee under the Act, fails to submit a return as required by the provisions of this Act, or the rules made thereunder hall on conviction be liable to a fine "

Before the prosecution the Commercial Tax Officer issued a notice to the accused proposing to levy a compounding fee in lieu of prosecution and for this notice the dealer replied that the amount reported as supression had been really included in the monthly returns submitted by him and therefore the prosecution might be dropped. It was alleged in the charge-sheet that the dealer did not produce any account or documentary evidence to support his contention and thus had failed to prove the correctness of the monthly returns submitted by him for the concerned years

The learned Magistate acquitted the accused on a preliminary ground which he recorded in the following manner Section 16 of the Madras General Sales Tax Act, 1959, gives the authority the power to assess escaped turnovers of a dealer at any time within a period of five years from the expiry of the year to which the tax relates. In other words, for 1956-57 the assessment of escaped turnover should have been made within 31st March, 1962, and for 1957-58 before 31st March, 1963 Rule 26 (16) of the Madras General Sales Tax Rules states that accounts maintained by dealers together with all vouchers relating to stocks, deliveries etc shall be preserved by them for a period of five years after the close of the year to which they relate, and at the place of business mentioned in the certificate of registration

After referring to the above two provisions, the learned Magistrate observed that by virtue of the abovesaid provisions, the assessing authority has power to look into the accounts to detect escaped tax only within a period of five years preceding the detection, and that it would necessarily follow that the assessing authority could not go beyond the period of five years and seek to make a dealer liable for any inaccuracies in the return submitted by him for that year The detection of an inaccuracy in the return forms part of the proceeding in an assessment, and as such inasmuch as section 16 prohibits scrutiny of accounts beyond a period of five years, the assessing authority cannot also proceed to scrutinise the correctness or otherwise of the return submitted in respect of the year preceding the five-year period The learned Magistrate therefore concluded that the prosecution was not maintainable and acquitted the accused

In my opinion, the learned Magistrate has not construed the above two provisions of the law correctly Section 16 provides a period of limitation for assessing escaped turnover, and it has nothing to do with the preservation of the accounts of a dealer It is Rule 26 (16) which provides a time limit for preservation of the accounts No doubt, it will work hardship is a dealer is required obligatorily to preserve his accounts only for a lesser period than 5 years, with liberty to destroy them thereafter while at the same time the assessing authority is given power to assess escaped turnover up to a time-limit of five years A dealer, may very well say that relying upon the provision for destroying accounts, he has destroyed them after the shorter time-limit, and he is not in a position to show-cause against the assessment of escaped turnover within the five year time-limit prescribed under section 16 That is the reason why rule 26 (16) and section 16 provides for an identical time-limit But, in the present case, the learned Magistrate has treated section 16 and Rule 26 (16) as providing as automatic bar against prosecution, after the lapse of five years. That view is clearly not correct One can visualise a situation where the prosecution may be able to show that the nature of the data gathered by them during an inspec-

tion, are such that they could lead to the inference of the inaccuracy of the return submitted by the dealer even without reference to the accounts of the dealer Thus while one type of inaccuracy may be related to the suppression of escaped turnover, there may be other inaccuracies which may not deal with the suppression of escaped turnover, but still will be sufficient to justify a prosecution for submission of an untrue return within the meaning of section 45 (2) (*a*) of the Act Even in regard to an inaccuracy in regard to turnover, the turnover revealed by the data secured may be so large that, these data by themselves and without reference to the actual accounts of the dealer—whether they are capable of being produced or not—would establish that the return submitted was untrue These questions have got to be investigated after the accused appears in Court But they cannot be ruled out on a preliminary finding that section 16 and rule 26 (16) automatically bar a prosecution under section 45 (2) (*a*), if the discovery of the data which led to the criminal prosecution, happens to be subsequent to the expiry of the five years period I may add that in this case the discovery of the additional data was on 1st June, 1963, while the five year period for the assessment of 1957-58 ended on 31st March, 1963 I am of opinion that the acquittal of the accused on the preliminary ground in this case is unjustified in the circumstances stated above

The appeals are allowed and the acquittals are set aside The learned Magistrate is directed to restore the cases to his file and deal with them according to law

R M. — *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE KAILASAM

Shanmugham . *Appellant**

v.

Angalamma Ammal .. *Respondent*

Civil Procedure Code (V of 1908), sections 11 and 47—Application for execution of something not directed by decree—Order made thereon without specific notice to judgment debtor of the claim—If can operate as res judicata *against judgment debtor.*

When an application is for execution of something which has not been directed by the decree, there must be specific notice of the relief prayed for to the judgment-debtor and an order made on such application without such a specific notice will not operate as *res judicata* against the judgment debtor If the decree-holder seeks to put in execution something which is not in the decree, specific notice of the claim should be given to the judgment-debtor before any bar of *res judicata* could be pleaded

Where a preliminary decree is a mortgage suit directed the sale of the hypotheca free from encumbrances but the decree-holder in execution of this decree sought for the sale of the hypotheca subject to an encumbrance in favour of a third party and the executing Court ordered the sale subject to the encumbrance as prayed for without specific notice to the judgment-debtor about the application for sale subject to an encumbrance,

Held, the order made by the execution Court will not operate as *res judicata* against the judgment debtor so as to preclude her from filing an application under section 47 of the Civil Procedure Code to set aside the sale Though the judgment-debtor was aware of the sale proclamation directing the sale of the property subject to encumbrance she was entitled to contend that the order to sell the property without notice to her was void and was hence liable to be set aside

Appeal against the order of the District Court, Tiruchirappalli dated 27th August, 1962, in C M A No 106 of 1961, preferred against the order of the District Munsif, Tiruchirappalli, dated 28th November, 1961, in E A No 1125 of 1961 in E P No 1355 of 1959 in O S No 660 of 1958

P Sharfuddin and *S M Amjad Nainar,* for Appellant

R T Gopalakrishnan and *S. K Ahmed Meeran,* for Respondents

The Court delivered the following

JUDGMENT —The third respondent, auction-purchaser, in E A No 1125 of 1961 in E P No 1355 of 1959 in O S No 660 of 1958 is the appellant herein E.A No 1125 of 1961 was filed by the first defendant in O S No 660 of 1958 under sec-

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*A A A O No. 129 of 1962. 18th August, 1965.

tion 47, Civil Procedure Code, for setting aside the sale held on 21st June, 1961, as it was illegal and void and liable to be set aside

O S No 660 of 1958 was instituted for recovery of the amount due under a mortgage executed by the first defendant, the first respondent herein The State of Madras was impleaded as the second defendant on the ground that it claimed some interest in the hypotheca by reason of a loan said to have been advanced to the first defendant The trial Court negatived the claim of the State of Madras and passed a preliminary decree for sale on 22nd June, 1959 in favour of the plaintiff Against that decree the State preferred an appeal, A S No 504 of 1959, which was allowed on 25th August, 1960 and the encumbrance in favour of the State was upheld. Pending appeal, the decree-holder-plaintiff filed E P No 1355 of 1959 for bringing the hypotheca to sale on 11th November, 1959 When that petition came on for hearing on 17th March, 1960, an endorsement was made by the decree-holder's Advocate to the following effect :

"The property may be brought to sale subject to the Government's encumbrance over the property This is without prejudice to the contentions in the appeal by the Government"

The petition was then posted to 26th March, 1960 for settlement of proclamation. Proclamation was issued for sale of the property on 29th June, 1960 subject to the security mortgage for Rs 1,600 in favour of the second defendant, without prejudice to the decree-holder's contention in the appeal There was no bid at the sale held in pursuance of this proclamation and therefore the decree-holder filed applications for reducing the upset price It is not disputed that the judgment-debtor was served with notices of these applications The upset price was reduced to Rs 4,500, then to Rs 3,500 and ultimately to Rs 2,550 The property was ultimately sold and purchased by the third respondent appellant on 21st June, 1961, for Rs 2,550 As already stated, E A. No 1125 of 1961 was filed on 18th July, 1961 for setting aside the said sale

The trial Court held that the judgment-debtor ought to have filed an application under Order 21, rule 90, Civil Procedure Code, and that a petition under section 47, Civil Procedure Code, does not lie It also held that the judgment-debtor has failed to prove that the sale was fraudulent or collusive or that it was vitiated by any irregularity or illegality, and dismissed the petition On appeal the learned District Judge held that the application under section 47, Civil Procedure Code, was maintainable and that the sale by the executing Court of the hypotheca subject to an encumbrance in favour of the State of Madras, is not in accordance with the decree and as such the sale is liable to be set aside He also held that as the execution was of the decree of the trial Court, subsequent to the passing of the decree by the appellate Court, without the necessary modification, it cannot be sustained He further held that as the execution of the decree was beyond the powers of the executing Court, no question of *res judicata* would arise In the result, the appeal was allowed and the sale was set aside Hence this appeal by the auction-purchaser.

In this appeal Mr Sharfuddin, learned Counsel for the appellant, did not contend that an application under section 47, Civil Procedure Code, does not lie He however contended that the judgment-debtor had ample notice of the proceedings which resulted in the sale of the property subject to the encumbrance in favour of the second defendant and as she did not raise the objection that the executing Court had no jurisdiction to execute the decree as the decree that was executed was that of the trial Court after the passing of the decree in appeal modifying the trial Court's decree, she is barred by constructive *res judicata* from raising these questions.

It is found from the records that the preliminary decree in O S No 660 of 1958 was passed on 22nd June, 1959 directing the defendants to pay into Court the sum of Rs 1,272-8-0 before a particular date and in default directing the hypotheca to be sold Clause (6) in that decree states .

"The second defendant be and is hereby declared not to be entitled to any prior charge over the property"

It was this decree that was put in execution in E P No 1355 of 1959 This appeal, as already stated, preferred by the State was allowed on 25th August,

1960 Pending that appeal an endorsement was made in the execution petition on 17th March, 1960 that the property may be sold subject to the encumbrance in favour of the second defendant and the executing Court also directed the sale of the property subject to that encumbrance According to the appellate decree the priority claimed by the second defendant was upheld But even though the decree of the trial Court was modified in appeal, the decree-holder did not intimate to the executing Court about the modification of the decree It is also seen from the records that the judgment-debtor was not put on notice regarding the endorsement made by the decree-holder's Advocate in the execution petition on 17th March, 1960 It does not also appear that the judgment-debtor was aware of the order of sale subject to the encumbrance in favour of the second defendant But it is not disputed that she was aware of the proclamation of sale of the property and of the subsequent proceedings which resulted in the reduction of the upset price.

On the facts stated above, two questions arise for consideration Firstly, the decree that was sought to be executed was different from the decree that was passed The decree as it stood did not provide for the sale of the hypotheca subject to the encumbrance in favour of the second defendant But the sale ordered for 29th June, 1960 directed the sale of the hypotheca subject to the encumbrance in favour of the second defendant There is nothing to indicate that the judgment-debtor had notice of this direction in the sale When the sale was ordered on 29th June, 1960, the appeal by the State had not been disposed of and there was no warrant on that date for selling the property subject to the encumbrance in favour of the second defendant It is thus clear that the executing Court was not acting within its jurisdiction in having directed the sale of the hypotheca subject to the encumbrance in favour of the second defendant But Mr Sharfuddin, learned Counsel for the appellant, submitted that even though the direction to sell was not in accordance with the decree, the judgment-debtor should not be allowed to raise this question as she failed to put forward this contention in the proceeding which resulted in the proclamation of sale and the further proceedings which resulted in the reduction of the upset price to Rs 2,550 But the learned Counsel was unable to point out from the record that the judgment-debtor had notice before the sale was ordered by the Court directing sale subject to the encumbrances in favour of the second defendant Though she was aware of the proclamation directing the sale of the property subject to encumbrance she is entitled to contend that the order to sell the property without notice to her is void and is liable to be set aside

It has been observed in *Ramaswami Naik* v *Ramaswami Chetti*[1] as follows :—

"When, however, it is endeavoured to obtain in execution something not granted by the decree, mere notice to the defendant that further execution is to be applied for, will not be sufficient to make the order *res judicata* against him And where the application is not for the execution of something which has been directed to be done by any decree or order so as *ipso facto* to carry information as to what the claim made and the relief prayed for are, notice to the judgment-debtor without inserting the specific prayers will not render the order made upon such application *res judicata* As in our opinion the decree did not order the sale of the interests of defendants 2 to 5 in the zamindari during the lifetime of the first defendant, and as they had no notice that it was intended to apply for a sale of their interests we think the two orders in question do not render the orders for sale *res judicata* against them "

Thus, it will be seen that when an application is for execution of something which has not been directed by the decree, there must be specific notice of the relief prayed for to the judgment-debtor, and a mere notice to him that further execution has been applied for, will not be sufficient to make the order *res judicata* against him. In this case there is nothing in the record to indicate that the judgment-debtor was put on notice of the fact that the property was to be sold subject to the encumbrance in favour of the second defendant, which direction is not in conformity with the decree In *Adaikappa Chetti* v *Natesa Chetty*[2], it was held that when the judgment-debtor had no sufficient notice of the right claimed against him, the order passed in execution proceedings cannot operate as *res judicata* The decision in

1. (1907) 17 M.L.J. 201 : I.L.R. 30 Mad 255 at 263. 2 (1929) 32 L.W. 615.

Narayana Pattar v *Gopalakrishna Pattar*[1], was cited with approval It was observed (at page 356) :

> " The appellant's application was not for the execution of something which had been directed to be done by any decree or order, so as *ipso facto* to convey information to the respondents as to what the claim made and the relief prayed for were, but in regard to a matter of which, so far as the question of interest at least was concerned, they could not without being expressly apprised have become aware of Consequently, the notice issued to them, such as it was, was insufficient to fix them with the knowledge of the claim for interest and thereby bar them from raising any controversy in the matter of their failing to appear on the date fixed."

In *Chidambara* v *Kandaswami*[2], it was held that where there is nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, the non-attendance cannot be taken to be estoppel by the principle of *res judicata* thereafter so as to prevent him from pleading that the property was not liable to attachment in execution by reason of that non-attendance. From the decisions cited above, it is clear that if the decree-holder seeks to put in execution something which is not in the decree, specific notice should be given to the judgment-debtor before any bar of *res judicata* could be pleaded In this case, the appellant has not succeeded in establishing that the judgment-debtor had notice that the property was to be sold subject to the encumbrance in favour of the second defendant

Mr Sharfuddin, learned Counsel for the appellant, relied on several decisions wherein it has been held that when a judgment-debtor could have taken a defence and if he had failed to take it, or after taking it he did not succeed in it, he would not be allowed to take the same ground in subsequent proceedings It is unnecessary to refer to these decisions as the proposition is not disputed by the learned Counsel for the judgment-debtor All that the learned Counsel for the judgment-debtor contended was that this execution was contrary to the terms of the decree, apart from the question that the executing Court had no jurisdiction to put the property to sale subject to the encumbrance, as the judgment-debtor had no notice of any of the proceedings which resulted in the order of sale subject to the encumbrance in favour of the second defendant. This point has to be found in favour of the judgment-debtor.

In this view, it is unnecessary to consider the other question whether the execution of the decree as passed by the trial Court, after it has been modified in appeal, is valid I agree with the finding of the lower appellate Court that the sale by the executing Court of the property subject to the encumbrance in favour of the second defendant cannot be held to be valid

In the result this appeal is dismissed with costs No leave

V K. *Appeal dismissed.*

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1 (1905) 15 M L J 247 I L R 28 Mad. 355.

2 45 M L J 346 18 L W. 757 (F B) . A I R 1924 Mad 1

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

Ts. Pl. Chidambaram Chettiar and others .. *Applicants**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Indian Income-tax Act, 1922 (XI of 1922), section 34 (1) (a)—Back assessment—Conditions for invoking jurisdiction—Reasonable belief of under-assessment and resulting from non-disclosure on the part of assessee—Essential—Material facts as to the receipt of a sum—Duty on the part of assessee to disclose fully and truly—Assessee, money-lender—Principal and interest due from a debtor—Settlement of sum due under a compromise decree—Discharge of amounts due under the decree—Original assessment of assessee Information about a receipt of a further sum by assessee, furnished by another Officer—No further materials before the Officer—Completion of assessment without including the further receipt—Subsequent reassessment proceedings—Initiation on the basis of accounts and testimony of debtor—Validity of proceedings.

Appropriation—Receipt by assessee of sums in addition to sums already received under the compromise decree—Not entered in the accounts—Open payment—Question between assessee and the Revenue—Principal and interest—Appropriation between—Presumption of appropriation in a manner least disadvantageous to assessee—Receipt not assessable.

Reassessment—Order of Officer set aside in appeal—Remand—Direction to Officer to re-do assessment according to law and after giving an opportunity to assessee to rebut evidence—Validity of notice of reassessment not in question at all—Effect of appellate order—Notice, if also set aside.

Words and Phrases—" Information ".

In respect of the loans advanced to the debtor by the father of the assessee, carrying on money-lending business, the debtor executed a mortgage for the payment of principal and interest due. In a suit filed by the father of the assessee on the foot of the mortgage to recover the total amount of Rs. 5,50,573 consisting of the principal and interest, a compromise decree was passed. Under the decree the assessee was to receive a sum of Rs. 3,50,500 on or before 1st October, 1945, in full satisfaction of his claims. The assessee had received the entire sum due under the decree. Before the original assessment for the assessment year 1944-45 was completed, the Officer received information from another Officer, that the assessee had received another sum of Rs. 1,50,000 from the debtor during the account year in question. The assessee denied the receipt of the sum and the Officer in the original assessment made the remark that further details have to be called for from the other Officer as regards that sum and proceeded to complete the assessment without considering the question of assessability of the further receipt. Then in reassessment proceedings under section 34 (1) (a) commenced in 1953, the Officer brought to tax the receipt of the sum of one and half lakh of rupees as a secret receipt got by the assessee quite apart from the compromise decree, on the basis of the entries in the account books of the debtor. On appeal the Appellate Commissioner set aside the order to enable the Officer to re-do the same according to law after taking proper evidence and giving an opportunity to the assessee to rebut such evidence. The Officer after remand, the Appellate Commissioner and the Tribunal on further appeals, held the sum was assessable as interest income. Hence the reference under section 66 (1) at the instance of the assessee.

Held, that though the reassessment proceedings had been validly initiated, yet the sum was not assessable to tax.

Two conditions must co-exist for the purpose of invoking the jurisdiction to reassess. The Officer must have reason to believe that there has been under-assessment and he must have reason to believe also that the under-assessment has resulted from non-disclosure of material facts on the part of the assessee. It is not necessary that the omission or failure on the part of the assessee and escape of income from assessment should be found as a condition precedent. All that section 34 (1) requires is that the Officer should have reason to believe that as a result of omission or failure on the part of the assessee income has escaped assessment in the particular year.

Whether there is a failure or omission to disclose on the part of the assessee is a factual matter for determination in each case. It is true that the section should not be used for filling up the deficiency of the assessing authority in the original assessment. But once all the primary facts are before the assessing authority he would require no further assistance by way of disclosure.

The duty to disclose is laid by the law on the assessee, and the duty is to disclose fully and truly all the material facts necessary for a particular year. It is not any information that the department may have as to the receipt that will dispense with the necessity of the assessee to discharge his duty.

Where a certain sum received has not been brought into the accounts of the assessee, it is not possible to attribute to the receipt any particular method of accounting and there is no appropriation of the sum so received, and it is therefore an open payment by a debtor to a creditor-assessee, in a question between the assessee and the Revenue, the presumption that the taxpayer is entitled to appropriate payments as between principal and interest in the manner least disadvantageous to himself is applicable.

* T.C. No. 143 of 1963. 6th January, 1966.

In an appeal against the order of reassessment made by the Officer, where the question of the validity of the notice of reassessment was not in issue, the order of the Appellate Authority remanding the matter to the Officer to re-do the case according to law after taking evidence properly and giving an opportunity to the assessee to rebut such evidence, would not have the effect of annulling or quashing the notice of reassessment itself

Clause (*a*) of section 34 (1) does not use the word " information " which occurs only in clause (*b*) What " information " in clause (*b*) means and includes, it is difficult and also not expedient to comprehensively define Obviously it is of wide import and may comprehend a variety of things including new facts, the correct position of law or a new aspect of it or even perhaps a legislative amendment compelling a retrospective deeming and so forth

Held on facts In the original assessment the Officer did not have the materials to find that the sum is question had been received by the assessee The assessee had failed to disclose fully and truly the material facts relating to the sum Even on the assumption that the department had information before the original assessment, as to the receipt of the sum, on the materials in its hand, that information was inadequate to justify a conclusion that the income had escaped assessment The information, consisting of the copy of the entries in the accounts of debtor and the statement and evidence of his agent, which alone showed the full particulars and circumstances of the receipt and proved that the assessee had failed to disclose the income and the same had escaped assessment, was received by the department subsequent to the original assessment The sum constituting an open payment must be held to be appropriated towards the principal and hence not assessable

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922), in R. A. No. 570 of 1962-63 (in I T.A No 5427 of 1961-62—Assessment year 1944-45).

M. Uthama Reddi instructed by *King & Partridge,* Attorneys for Applicants

V Balasubrahmanyan, Special Counsel for Income-tax, on behalf of Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—This reference relates to the assessment year 1944-45 corresponding to the accounting year ended on 12th April, 1944. The assessee is a money-lender at Tiruchirapalli His father Palaniappa Chettiar, who was carrying on business at that place, had made various advances to Nallathambi Sakkarai Manradiar known as, Pattayagar, a prominent landlord in Coimbatore District, on promissory notes which, in all, amounted to Rs 1,38,535 as on 6th July, 1932 towards principal and Rs 1,34,965 towards interest Including a further cash advance of Rs 2,500, the Pattayagar executed a mortgage on that day securing repayment of the aggregate amount of Rs 2,76,000. Till 1938, only a sum of Rs 13,620 was paid by the mortgagor in part payment of the debt. On 14th December, 1940, the mortgagee instituted a suit to enforce the mortgage and recover Rs. 5,50,573 made up of the principal sum of Rs. 2,76,000 and interest of Rs 2,88,193 less the sum of Rs 13,620 paid by the mortgagor. In September, 1943 the suit was compromised and on 5th October, 1943 a decree was passed in terms of the compromise according to which the mortgagee was to receive Rs 3,50,500 on or before 1st October, 1944 in full satisfaction of his claim with interest at 3 per cent. per annum on amounts remaining unpaid. The debt under the compromise decree was discharged by payment partly in cash and partly by sale of the hypotheca to third parties with directions to the purchasers to pay the proceeds to the decree-holder Sometime before October 1945, Pattayagar died and his eldest son paid Rs. 78,405 on 18th October, 1945 which was the sum still outstanding, and discharged the entire debt.

For the assessment year 1944-45, Chidambaram Chettiar, as the karta of his Hindu undivided family, was assessed under section 23 (3) on 12th February, 1946 on a total income of Rs. 78,556 which, on appeal, was reduced to Rs. 53,153. Before the original assessment order was made the Income-tax Officer,

who made it, had received information from the Income-tax Officer, at Erode that the Pattayagar had paid the assessee a sum of Rs. 1,50,000 during the year ended 12th April, 1944, and on 28th March, 1945, the Income-tax Officer, in the course of the original assessment, raised this question. As the assessee denied the receipt, the Income-tax Officer made the following remarks on 27th May, 1945 in his order-sheet for 1944-45:

"It is denied that there was any secret understanding not to show the payment of Rs. 1,50,000 The receipt of this amount is entirely denied . The Income-tax Officer, Erode, should be asked to give further details and to ask the Pattayagar to produce evidence of the payment In any event, this should come up for consideration only in the assessment year 1944-45 as only the excess over Rs 2,76,000 plus legal expenses can be treated as interest income in the hands of the assessee and so, the assessment for 1944-45 should not be held up pending further investigation"

No further action would appear to have been taken by the Income-tax Officer till the original assessment was completed in February, 1946 After further investigation, the Income-tax Officer acting under section 34 (1) (*a*) and section 23 (3) issued a notice to the assessee dated 9th March, 1953 in answer to which the assessee filed a return as before for the assessment year 1944-45 again denying receipt of the sum of Rs 1,50,000 The Income-tax Officer proceeded on the basis that assessee's method of accounting was the Chetty system Mainly relying on the entries in the account-books of the Pattayagar supported by the evidence of his agent, the Income-tax Officer found that the Pattayagar had paid the assessee in cash Rs 10,000 on 5th September, 1943 and Rs 1,40,000 on 28th September, 1943 There was also entries in the Pattayagar's accounts of borrowal of two sums from third parties before they were paid over to the assessee A sum of Rs. 1,00,000 came to the Pattayagar from K. R. Easwaramoorthy Goundar on 24th September, 1943 which was evident from the account-books of Easwaramoorthy Goundar and his drawal of Rs 1,00,000 from the Imperial Bank of India, Tiruppur. The entries in Pattayagar's accounts contained full details of the settlement which preceded the compromise decree According to these entries, the claim in the mortgage suit was settled between the parties at Rs. 5,00,500 of which Rs 1,50,000 was to be paid in cash before the next bearing of the suit and for the balance a compromise decree should be passed A further detail found in the entries was that a sum of Rs. 34,840, which the Pattayagar, as Receiver appointed in the suit, had deposited into Court, might be drawn out by the decree-holder towards partial payment of Rs. 3,50,500 With reference to these entries and details, the Income-tax Officer concluded that the suit claim at the time of the compromise being about Rs. 6,50,000 and as the compromise decree covered a sum of Rs 3,50,500, the assessee and the Pattayagar must have secretly agreed between themselves that the former should give up Rs. 1,50,000 and the latter should pay the remaining Rs 1,50,000 to the assessee in cash. On that view, he found that the assessee failed to disclose receipt of Rs. 1,50,000 and brought it to tax. There was an appeal against his order which was allowed on a short point, namely:

"On perusing the Income-tax Officer's grounds and the representative's arguments, I (Appellate Assistant Commissioner) find that the appellant has not been given an opportunity to cross-examine those parties whose statements have been made use of by the Income-tax Officer against the appellant I therefore set aside the order to enable the Income-tax Officer to re-do the same according to law after giving an opportunity to the appellant to place all his cards before the Department as well after allowing him to cross-examine the parties whose statements the Income-tax Officer wants to make use of against the appellant".

When the matter went back to the Income-tax Officer, he proceeded under section 23 (3) and section 34, and after complying with the directions of the Appellate Officer, found over again that the assessee had received a sum of Rs. 1,50,000 in the accounting year and he did not bring the sum to his books and that there was thus a deliberate concealment of the income The appeal and a further appeal by the assessee failed. Under section 66 (1) of the Income-tax Act, the following questions have been referred to us :

"(1) Whether assessment under section 34 was valid and proper?

(2) Whether the Income-tax Officer rightly acted in giving effect to the order of the Appellate Assistant Commissioner setting aside the assessment to re-do the same according to law after giving an opportunity to the appellant to place all his cards before the Department?

(3) Whether Rs 1,50,000 is taxable as income of the year of account?"

These questions were considered by the Tribunal but were found against the assessee

A three-fold submission is made for the assessee on the first question. The first is that there was a determination in the original assessment order that the sum of Rs 1,50,000 would not be income of the assessment year 1944-45 but of 1945-46 and that, therefore, the second Income-tax Officer could not reasonably believe that the income had escaped assessment in the assessment year 1944-45 The second is that assuming that there was under-assessment and there was failure on the part of the assessee to disclose, there was no casual connexion between the two. The third is that the only primary relevant fact being whether Rs 1,50,000 was received in the accounting year, this was within the knowledge of the First Income-tax Officer and, therefore, there was no fresh information subsequent to 12th February, 1946.

We are not satisfied that there is substance in any of these submissions. Assuming—it is not necessary to decide on the view we take—that a factual finding or determination by the assessing authority in relation to any question as to the receipt of income or as to whether it can be taken into account in any particular year cannot be reopened by the same authority under section 34 (1), it is not possible to accept the contention for the assessee that there was any such determination in this case by the first Income-tax Officer. He had no doubt information that the assessee was in receipt of Rs 1,50,000 in the accounting year but as he himself stated in his order-sheet, there were not enough materials before him to establish the fact of receipt and further that it had escaped assessment. When he made it clear that in order to come to a conclusion it was necessary to get further materials both from the Income-tax Officer at Erode and the Pattayagar as well as other sources, hardly would it be justifiable to impute to him a determination that the receipt was a fact that it should be considered only in the following assessment year. His observations that only the excess over Rs. 2,76,000 plus legal expenses could be treated as interest or income in the hands of the assessee and, therefore, the sum of Rs. 1,50,000 should come up for consideration in the next assessment year cannot be regarded as a determination of the question, because in point of fact he was unable, on the materials before him to arrive at a finding that the amount had been received. It was only when the second Income-tax Officer received, subsequent to the original assessment, an extract of the relevant entries from the account-books of Pattayagar, supported by the oral statement and evidence of his agent, that he was in a position to find that the sum had been received by the assessee in the accounting year and that it had escaped assessment It cannot, therefore be said that the Second Income-tax Officer could not reasonably believe that the income had escaped assessment.

The second ground is based on the language of section 34 (1) (*a*) which is that for its application, the Income-tax Officer should have reason to believe that by reason of the omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for a particular year, income, profits or gains chargeable to income-tax have escaped assessment for that year or have been under-assessed. The belief of the Officer is as to escapement of income and the belief should not be a product of imagination or speculation. There must be reason to induce the belief. Further, the belief should be that by reason of omission or failure on the part of the assessee to disclose fully and truly the material facts, income has escaped assessment in any particular year. Unless the escapement is as consequence or result of such omission or failure, the provision will have no application. As

rightly pointed out for the assessee, there should be a causal connexion between the particular conduct of the assessee and the result, namely, income in consequence escaping assessment But it is not necessary, in our opinion, that for invoking the jurisdiction under section 34 (1) (*a*) and initiating action thereunder, omission or failure on the part of the assessee and escape of income from assessment should be found as a condition precedent All that the section requires is that the Income-tax Officer should have reason to believe that as a result of omission or failure on the part of the assessee, income has escaped assessment in a particular year Such a belief, as we think, could not of course be entertained by the Income-tax Officer if he had no reason to think that escapement was by reason of omission or failure on the part of the assessee

It is urged, therefore, that the under-assessment, if any, was not due to any failure of the assessee to give all facts or any omission on his part to disclose material particulars and that so far as he is concerned, he is still denying the receipt If the Income-tax Officer had information, as it was alleged, that the assessee had received the sum, it was his duty, as the argument proceeds, to have it investigated Learned Counsel for the assessee asked how could the Revenue say that there was failure on the part of the assessee to disclose, when it had already been in possession of information as to the receipt and its escapement from assessment He argues, therefore, that failure or omission on the part of the assessee did not result in under-assessment.

Learned Counsel, as we said, is right on his legal submission as to the requirements to be satisfied for application of section 34 (1) (*a*) As observed by the Supreme Court in *Calcutta Discount Co., Ltd* v. *Income-tax Officer*[1] before the Income-tax Officer assumes jurisdiction to start proceedings, two conditions must co-exist to invoke the jurisdiction, namely, (1) he must have reason to believe that there has been under-assessment and (2) he must have reason to believe also that under-assessment has resulted from non-disclosure of material facts It is also true that section 34 (1) (*a*) should not be used for filling up the deficiency of the assessing authority in the original assessment proceeding *E M. Muthappa Chettiar v. Commissioner of Income-tax*[2]. Whether there is a failure or omission to disclose on the part of the assessee is a factual matter for determination in each case. But once all the primary facts are before the assessing authority, as was pointed out in *Calcutta Discount Co , Ltd* v *Income-tax Officer*[1] he requires no further assistance by way of disclosure. This Court said in *E. M Muthappa Chettiar* v *Commissioner of Income-tax*[2]

"Cases sought to be brought within section 34 (1) (*a*) should strictly fall within that provision and it is for the department to show that the necessary conditions for the exercise of jurisdiction are fully present The Department is not at liberty to take hold of any and every circumstance, call it non-disclosure of material facts and set the machinery of re-assessment in motion If this were to be permitted, there is every danger of this provision of law being used as an instrument of oppression against the assessee The true position is that if the Income-tax Officer was left in the dark in respect of basic and crucial facts relevant to the assessment, he has jurisdiction to reopen the assessment and pass orders of re-assessment "

Learned Counsel for the assessee says that the primary fact, namely, that the assessee was in receipt of Rs. 1,50,000 was before the Assessing Officer, before he completed the assessment for the assessment year 1944-45, though the receipt was denied by the assessee and that if he required further materials, he should have asked for the same or proceeded with his investigation before completing the assessment and not completed the assessment and postponed investigation and gathering of materials If the primary fact was before the assessing authority, it could not then be said, according to learned Counsel for the assessee, that there was any omission or failure on the part of the assessee, to disclose that fact, so, the escapement, if any, could not truly be said to be the consequence of any omission or failure of the assessee to disclose. A part of the argument is not without some force The First Income-tax Officer did have the information before he completed the assess-

1. (1961) 41 I T R 191 : (1963) 1 S C J 741: (1961) 2 S C R 241 A I.R. 1961 S C. 372

2. (1964) 53 I.T R. 642, 650

ment for 1944-45 that the assessee had received a large sum in the accounting year which he had not shown in his return, and it was his duty to have further investigated into it so that he might be able to come to a definite conclusion on it before completing the assessment. It, however, appears that he did not proceed with the investigation then and there because he was of opinion that, in any case, the receipt, if true, would be relevant for consideration only in the following year of assessment In the circumstances, can it be said that there was failure or omission on the part of the assessee to disclose? There can be only one answer to this question that is against the assessee. Throughout he kept on denying the receipt, though he is not now in a position to dispute the factual finding of all the authorities below in respect of it The duty to disclose is laid by the law on the assessee, and the duty is to disclose fully and truly all the material facts necessary for the assessment for particular year. When the assessee denied the fact of receipt, it cannot be said that he discharged that duty. It is not any information that the Department may have as to receipt that will dispense with the necessity of the assessee to discharge his duty It is obvious from the order-sheet of the First Income-tax Officer that, as a matter of fact, beyond the information that there was payment by the Pattayagar to the assessee of a sum of Rs 1,50,000 in the accounting year, there was no further material on which the information could be substantiated Further, even if there was information as to the receipt, on the materials before him, the First Income-tax Officer had no reason to think that it had escaped assessment The assessee could successfully avoid section 34 (1) (*a*) only if he could show that not only the First Income-tax Officer had information as to the receipt but also as to the factum of its escapement from tax · *Chatturam Horilram Ltd* v *Commissioner of Income-tax* [1] On the facts in this case, there is no doubt that the assessee failed to disclose fully and truly the material facts relating to the sum of Rs 1,50,000 and the information with the First Income-tax Officer before he completed the original assessment was inconclusive and was not such as to enable him to find, as a fact, that the assessee had received the sum The second ground of the assessee in relation to the first question fails.

The next contention is that there was no fresh information in respect of the sum of Rs 1,50,000 subsequent to 12th February, 1946 when the original assessment was completed and section 34 (1) (*a*) would not, therefore, be properly invoked It is said that the primary relevant fact is whether the assessee was in receipt of the amount and that was within the knowledge of the assessing authority before that date, and if that were so, it is impossible to say that there was fresh or subsequent information so as to justify action under section 34 (1). The argument for the assessee goes so far as to suggest that in the circumstances neither clause (2) nor clause (*b*) of section 34 (1) would be applicable The Revenue in this case has not relied on clause (*b*), and in fact, the first and second orders under section 34 proceeded on the basis that there was omission or failure on the part of the assessee to make full and true disclosure of all material facts In our opinion, the Revenue was, in the circumstances, justified in doing so It is not necessary to reiterate that in the original assessment proceedings and before and after the proceedings under section 34, the assessee persisted in his denial of the receipt, and the insufficient material in the form of a communication from the Income-tax Officer, Erode, to the Assessing Officer did not establish the fact of omission or failure on the part of the assessee to make a true disclosure It was only when, after the original assessment, the copy of the relevant entries of the accounts of the Pattayagar, the statement and evidence of his agent were recorded that the Revenue could possibly find on the question of omission or failure of the assessee As already mentioned and as pointed out in *Chatturam Horilram Ltd.* v *Commissioner of Income-tax*[1] it is not any information for purposes of clause (*a*) of section 34 (1) that will suffice but it must be such material as will show not merely the assessee was in receipt of

1. (1955) S C J. 571: (1955) 27 I.T R 709 . I L.R. (1955) Pat 553. (1955) 2 S C R 290.

income in an accounting year, which he omitted or failed to disclose, but such income had also escaped assessment Even assuming that the Department had information before making the original assessment that the assessee was in receipt of the income, which, as we said, the Department, on the material in its hands, at the time of the original assessment could not decide, that information certainly was inadequate to justify a conclusion that the income had escaped assessment The information consisting of the copy of the entries in the Pattayagar's accounts and the statement and evidence of his agent which alone showed the full particulars and circumstances of the receipt and proved that the assessee had failed to disclose the income and the same had escaped assessment, was received by the Department subsequent to the original assessment. On facts, the assessee is not correct in his contention that there was no fresh information received by the Department subsequent to 12th February, 1946.

Clause (*a*) of section 34 (1) does not use the word "information" which occurs only in clause (*b*) What "information" in clause (*b*) means and includes, it is difficult and also not expedient to comprehensively define Obviously it is of wide import and may comprehend a variety of things including new facts, the correct position of law or a new aspect of it or even perhaps a legislative amendment compelling a retrospective deeming and so forth The Supreme Court in *Maharaj Kumar Kamal Singh* v. *Commissioner of Income-tax*[1] held that the word "information" in its plain grammatical meaning included information as to facts and information as to the state of the law. It was also pointed out that sections 33-B and 35 did not limit the amplitude of the word. Observed the Supreme Court:

> " it would be unreasonable to limit it to information as to the facts on the extraneous consideration that some cases of assessment which need to be revised or rectified on the ground of mistake of law may conceivably be covered by sections 33 B and 35 Besides, the application of these two sections is subject to the limitations prescribed by them, and the fact that the said sections confer powers for revision or rectification would not be relevant and material in construing section 34 (1) (*b*) we would accordingly hold that the word 'information' in section 34 (1) (*b*, includes information as to the true and correct state of the law and so would cover information as relevant judicial decisions".

On that view, it was held that the decision of the Supreme Court there in question should be treated as information within section 34 (1)(*b*) In the course of its judgment, the Supreme Court adverted to the position that under the *Explanation* to section 34 the fact that with due deligence material facts could have been discovered by the Income-tax Officer from the account-books or other evidence produced by the assessee before him would not constitute disclosure. Learned Counsel for the assessee contended on the strength of *Ananthalakshmi Ammal* v. *Commissioner of Income-tax*[2] that a change of opinion of the Income-tax Officer on a factual matter did not amount to definite information within the meaning of section 34 to enable him to exercise the powers thereunder. But we have already held that the Income-tax Officer in the course of the original assessment proceedings did not in his order-sheet express any definite or conclusive opinion; nor could he do so on the scanty materials before him at the time as to the factum of the receipt and its escapement from tax Our attention was invited to a number of decisions as to what constituted information for purposes of section 34 in the context of the particular facts but we think it unnecessary to specifically refer to them not only because they were decided on the language of the section as it stood at the relevant time of those decisions but the power in this case was exercised not under clause (*b*) as we said but under clause (*a*). The stress in that clause is not on receipt of subsequent information giving rise to a belief in the Income-tax Officer that the income, profits or gains chargeable to tax had escaped assessment in a year but on the omission or failure on the part of the assessee to make a return of his income under section 22 of any year or to disclose

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1 (1959) 1 An W R (S C) 92 (1959) 1 M L J (S C) 92 (1959) 35 I T R 1 at pp 6-7: I L R (1959) Pat. 369: (1959) 1 S C R (Sup) 10 (1959) S C J 230

2 (1955) 2 M L J. 337 (1955) 28 I T.R. 178

fully and truly all material facts necessary for assessment for that year. This clause impliedly places a duty on the assessee to make a full disclosure and if the Income-tax Officer has reason to belive that there has been such failure or omission and as a result, the income, profits or gains chargeable to tax had escaped assessment, he would be justified in invoking his jurisdiction under that clause. We have already referred to *Calcutta Discount Co., Ltd.* v. *Income-tax Officer*[1] in which the Supreme Court held that the jurisdiction under clause (*a*) arises if both the conditions, (1) the Income-tax Officer having reason to belive that the income has been under-assessed and (2) such under-assessment occurred by reason of omission or failure on the part of the assessee to make a return of his income under section 22 or omission or failure on his part to disclose fully and truly all material facts necessary for his assessment for that year, are satisfied as a condition precedent. We are of opinion that this twin requisite is satisfied in this case and the jurisdiction, in section 34 (1) (*a*) has been properly invoked. The first question under reference should, therefore, be answered in the affirmative

We think there is very little substance in the second question for our consideration The contention of the assessee is that having regard to the terms in which the Appellate Assistant Commissioner set aside the first order of the Income-tax Officer under section 34, the second order under that provision, inasmuchas no fresh notice was given under section 34, is invalid and without jurisdiction. The Appellate Assistant Commissioner in setting aside the order said:

"I therefore set aside the order to enable the Income-tax Officer to re-do the same according to law after giving an opportunity to the appellant to place all his cards before the department ... .. . "

"Re-do" according to the assessee, means "re-do from the inception" that is to say, it amounts to a direction to the Income-tax Officer to start afresh by serving notice again under section 34. Learned Counsel for the assessee also urges that when the first order of the Income-tax Officer under section 34 was set aside with a direction to re-do, and re-do according to law, that again means the Income-tax Officer must re-do with a fresh notice under that section. In support of the contention, reference is made to *K S Firm* v. *Commissioner of Income-tax*[2] which was concerned with the second proviso to section 34 (3); it was held there that the proviso did not enable the Department to make an assessment without initiating proceedings under section 34 and it merely removed the time-limit fixed by sections 34 (1) (*a*) and 34 (1) (*b*) We are unable to accept the contention for the assessee; nor do we think that the decision relied on supports the contention. It is true that if no notice is issued under section 34 (1), proceedings for re-assessment under that provision would be invalid. But it is not in dispute that such a notice was given before the Income-tax Officer made an order in the first instance under section 34 Before the Appellate Authority, there was no question of the invalidity of the notice Admittedly, when the notice served before the first order under section 34 and under that provision it was a valid notice, in our opinion, the terms in which the Appellate Assistant Commissioner set aside the order and gave direction to the Income-tax Officer to re-do according to law do not imply or have the effect that the notice also was annulled or quashed. The ground of the appellate order setting aside the first order of the Income-tax Officer was that the latter had relied on *ex parte* statements of certain persons without giving an opportunity to the assessee to test their veracity by cross-examination and to place his materials to establish his case That being the case, the fact of the Appellate Assistant Commissioner setting aside the first order under section 34 and directing the Income-tax Officer to re-do according to law does not call for a fresh notice or made such a notice as a condition to the valid exercise of power under section 34.

That takes us to the last question. A part of the argument for the assessee is based on section 13 of the Income-tax Act, 1922 and the rest on the principle applicable to appropriation of a part of the payment towards a debt covered by a

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1 (1963) 1 S.C J. 741 (1961) 41 I.T.R 191 : (1961) 2 S C R 241.

2 (1964) 2 I T J 560 (1964) 2 M L J. 467 : (1965) 55 I T R 29 I L R (1965) 1 Mad. 590

settlement in relation to the debt Throughout, the method of accounting maintained by the assessee and his father has been mentioned by the Revenue as the "Chetty-system for money-lending and mercantile for others" The assessee belongs to Nattukottai Chetty community. It is generally known that the Chetty-system usually adopted by the community is a combination of mercantile and cash basis of accounting, the former applied to transactions as between members of the community, and the latter to those parties outside the community. Where part payment were made by such third parties, the practice appears to be for the Nattukottai Chetty community, under the Chetty-system of accounting, to credit them towards principal and the balance if any towards interest In his second order, the Income-tax Officer, however, stated that normally in the Chetty-system of accounting, interest credited is always debited to the account and vaddi chittais are issued and as such, the assessment of Rs 1,50,000 in the year of account was in order. The Appellate Assistant Commissioner dealt with the receipt of the sum as an open payment from the debtor and treated it as income of the accounting year on the view that, in a case, where neither the debtor nor the creditor makes any appropriation of the payment as between principal and interest, the Department was entitled to treat the payment as applicable to the outstanding interest and assessee it as income The Tribunal noticed the assessee's contention that according to the Chetty-system, when money was received from a debtor, credit was given to Court expenses, then towards capital due, and the balance left, if any, was treated as interest, but considered that it would not avail the assessee, for

"When the mortgage was taken in 1932, Rs 1,34,965 was interest due till then, but this together with principal due was included in the mortgage, which means that the assessee has adopted the mercantile system and has no case for bringing in aid the Chetty-system of maintenance of accounts".

We are unable to appreciate what precisely the Tribunal meant by this observation If it meant that because the entire amount due both for principal and interest was consolidated and a mortgage was taken in 1932 securing the same, it necessary followed that the assessee had adopted the mercantile system which will, in our opinion, be clearly wrong, for that would be the case even if the cash system had been adopted The mortgage for the entire debt cannot, as we think, in any case justify the Tribunal's inference that the assessee had adopted the mercantile system As we said, the Department itself had proceeded, at the earlier stages, on the basis, and quite rightly, that the assessee had adopted the Chetty-system which is a combination of the mercantile and cash basis It is true that none of the Departmental authorities would appear to have expressly addressed itself to the question and decided as to the method of assessee's accounting But section 13 enjoins a duty on the assessing officers to determine the method of accounting regularly employed by an assessee and assess income, profits and gains in accordance with such method of accounting. The section says that:

"Income, profits and gains shall be computed for the purpose of sections 10 and 12, in accordance with the method of accounting regularly employed by the assessee "

A departure is permissible only in cases covered by the proviso to the section, that is to say, if no method of accounting is regularly employed, or if the method employed by the assessee is such that in the opinion of the Income-tax Officer, the income, profits and gains cannot be properly deduced therefrom, it is only then a computation can be made upon such basis and in such manner as the Income-tax Officer may determine In making as assessment, therefore, necessarily the method of accounting regularly employed or the true basis on which income, profits and gains can be determined has to be decided and if there is no express decision, the question must be deemed to have been decided In that sense, the non-exercise of the power under section 13 must be taken to imply a decision as to the method of accounting adopted by the assessee whose assessment has been completed

But the third question under reference, in the circumstances of this case, ought, in our opinion, to be decided more with reference to the correct principle

applicable to appropriations of an open payment. In deciding this question, the circumstances that the receipt of the sum of Rs. 1,50,000 had not been brought into the accounts of the assessee could make no difference to the fact that when it is established and there is nothing to show that it had been appropriated either towards principal or interest, the payment should be regarded as an open payment.

If it was a matter between creditor and his debtor, in the absence of the debtor exercising a preference, it may be presumed that the creditor has appropriated it towards outstanding interest and then only to the principal. But this rule of appropriation has, in our view, no application where it is a question between an assessee and the Revenue. In such a case, the intention of the assessee must be presumed to be in favour of an appropriation least disadvantageous to himself This proposition has the authority of the Privy Council in *Commissioner of Income-tax* v. *Kameshwar Singh* [1] There the Board observed :

"Moreover, if the question were one between Kumar Ganesh Singh and the assessee, *i e.* between debtor and creditor, the assessee might up to the last moment appropriate the Rs 20 74,973 to capital account *Cory Brothers & Co* v *Owners of the Mecca*[2] and there is authority for the proposition that in a question with the revenue the tax-payer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself *Smith* v. *Law Guarantee and Trust Society Ltd* [3] Their Lordships have also not omitted to bear in mind the provisions of sections 60 and 61 of the Indian Contract Act, though these were not relied on in argument as applicable to the case"

In that case, in the year of account a certain debtor owed the assessee Rs. 32 lakhs as principal and Rs 6,09,571 as interest, that is a total of Rs. 38,09,571, as an unsecured loan In that year, the assessee and his debtor entered into an arrangement, whereby the former took over from the latter in satisfaction of the amount certain immovable properties and also hand-notes from the debtor to the value of Rs 17,34,596 The question was whether the interest of Rs 6,09,571 could be considered to have been received in the accounting year and to be assessable as such The Revenue was of the opinion that, when rightly viewed, the transaction amounted to acceptance by the assessee from the debtor in lieu and satisfaction of the capital and interest due to him, of assets and securities *prima facie* worth the valuation put upon them and that as the assessee had thus received payment in kind of the interest due to him in full, he should be assessed accordingly The High Court did not accept that view. One of the arguments for the Crown before the Board was that assuming that the hand-notes from the debtor did not constitute receipt of income, the value of the properties adjusted partly against the debt and amounting to Rs 20,74,973 should be treated as money's worth and that as this sum far exceeded the total amount of interest due, it must be treated as applicable in the first place to the discharge of the debtor's liability for interest. In support of this argument, reliance was placed on the presumption that the creditor is presumed to apply payments received from the debtor towards extinction of the claims towards interest before capital claims. The Board rejected the argument on two grounds, one of which is that contained in the observations above extracted by us from the judgment of the Board The other ground was this

"Here, there was an arrangememt affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance The basis of the presumption, namely, that it is to the creditor's advantage to attribute payments to interest in the first place, leaving the interest-bearing capital outstanding, is gone"

Counsel for the assessee before us relied on the second ground as well and contended that the sum of Rs 1,50,000 must be taken to have been received as part payment towards the settlement which eventually took the form of a compromise decree But it is argued for the Revenue that the factual question whether this sum of Rs. 1,50,000 formed part and parcel of the settlement has

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1. 64 M L J 612· (1933) 1 I T.R. 94, 108 L R 60 I A 146
2. L.R. (1897) A C. 286.
3. L.R (1904) 2 Ch. 569 73 L.J. Ch. 733 : 91 L.T. 545.

not been investigated and that therefore, the assessee is not entitled to rely on the second ground of the Board which we mentioned. On the view we have taken, it seems to us to be unnecessary to rest our judgment on a ground analogous to the second ground of the Board though we are inclined to think that the third question referred to us is wide enough to cover the aspect whether the sum of Rs. 1,50,000 formed part of the compromise or settlement and, therefore, should be regarded as a payment towards capital We are content to rest our decision on the ground that where a certain sum received has not been brought into the assessee's account, and, therefore, it is not possible to attribute to the receipt any particular method of accounting and there is no appropriation of the sum so received, and it is therefore an open payment by a debtor to the creditor, in a question between the assessee or taxpayer and the Revenue, the presumption, laid down by the Board that the taxpayer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself, is applicable The assessee must therefore succeed on the third question.

We answer the first two questions against the assessee and the third question in his favour and against the Revenue. The assessee is entitled to his costs. Counsel's fees Rs. 250.

V.S. *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. VEERASWAMI AND MR. JUSTICE T. VENKATADRI.

Gnanambika Mills Ltd .. *Applicant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act, (XI of 1922), section 28 (1) (c)—Penalty—Proceeding penal in character—Requisites for the levy—Strict construction and proof implied—Burden of proof on the Revenue—Proof beyond reasonable doubt—Not to mean beyond shadow of doubt—Higher degreee of probability than required in civil cases—Assessment and penalty proceedings—Nature different—Penalty proceedings, independent proceedings—Not concluded by the assessment or reassessment proceedings—Findings in assessment or re-assessment proceedings—If prima facie *evidence in levy of penalty—Depends upon circumstances, findings based on materials and high degree of probability—Assessee, member of Mill Owners' Association—Sale of yarn at higher market rates than fixed by the Association—Suppression from account books—Levy of penalty.*

In the course of the assessment proceedings it was found that the assessee who was a member of the Mill Owners' Association, had sold yarn at a higher rate than was fixed by the Association and that the alleged sales to its employees and the villagers was not proved and that sales were directly made to certain dealers at a higher market rate In the penalty proceedings the Department found these facts and held that the profits referable to these transactions were suppressed from its books While the addition to the income was made at Rs 77,641, the Tribunal finally upheld the order of penalty of Rs 32,000 under section 28 (1) (c) of the Act In reference proceedings,

Held, that the provisions in section 28 as well as the nature of the penalty clearly point out the character of the proceedings as penal and it implies a strict construction and unless the requisites of the levy are clearly established, there could obviously be no levy The burden of proof, is therefore, naturally on the Department to prove beyond doubt that there has been a concealment or deliberate furnishing of inaccurate particulars of the income Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt There must be a higher degree of probability than what is implied in the discharge of burden of an issue in a civil case

Section 28 of the Act contemplates an independent proceeding which is not concluded by an order of assessment or any observations contained therein

Having regard to the nature of the proceedings in levying a penalty and the considerations which applied for giving a decision in the two proceedings, the determination of the income to be added in the assessment or reassessment is not final in so far as the imposition of penalty under section 28 is concerned

The question whether the findings in assessment or reassessment proceedings can be used as *prima facie* evidence in penalty proceedings will depend upon the facts and circumstances of each case and whether such findings are based on material and on high degree of probability

* T C No 180 of 1962. 25th August, 1965.

Where on the facts found in the assessment or reassessment order, concealment is so patent, there is no reason why the Officer cannot rely on that in the penalty proceedings and call upon the assessee why in view of that, penalty should not be levied

Though penalty may be in the nature of additional tax, the levy is of a penal character

On the facts —On the finding of the Tribunal, the levy of penalty is properly made under section 28 of the Act

Reference under section 66 (2) of the Indian Income-tax Act, 1922.

S. Swaminathan and *K. Ramagopal*, for Applicant.

V. Balasubrahmanyan, Standing Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—For the assessment year 1949-50, a penalty of Rs. 32,000 as reduced by the Appellate Assistant Commissioner, with whom the Tribunal agreed, was levied on the assessee The question directed to be referred to us under section 66 (2) of the Income-tax Act, 1922 is whether, on the facts and in the circumstances of the case, the levy of penalty of Rs 32,000 on the assessee-company was lawful In the assessment of total profits of the assessee for that year, certain additions had been made referable to under-statement of sales of yarn and waste which, as eventually found on appeals, amounted in the aggregate to Rs 77,641. In the penalty proceedings, it has been found by all the authorities including the Tribunal that the assessee had concealed or kept back the profits to that extent, but as regards the quantum of tax sought to be affected, the Appellate Assistant Commissioner, as reduced by him, found it to be Rs 32,098. Though one and a half times of that amount might be levied as penalty, he actually limited it to the sum we mentioned.

The facts and circumstances relating to the addition of profits aforesaid to the total profits chargeable to tax for the year have been set out by us in Tax Case No. 5 of 1964 *Gnanambika Mills Limited* v *Commissioner of Income-tax*[1] which we heard along with this case and do not require an elaborate reiteration The assessee during the relevant year was a company engaged in the manufacture and sale of yarn at Vellakkinar near Coimbatore and during the course of business had to buy cotton, spin it into yarn and sell the same in the open market The price of yarn was under control, but there was decontrol between 24th April and 31st July, 1948. The South Indian Mill Owners' Association of which the assessee was a member, fixed however the prices of yarn of different counts by a circular dated 22nd April, 1948 Though this circular was expected to be followed by the assessee as a member of the Association, it did not adhere to it The assessee was said to have sold during this period about 468 bales of yarn worth Rs. 3,53,205 to its employees and certain villagers about 57 in number, at the Association rates The assessee had stated that it made this gesture, as its employees and villagers were helpful to the management during the strike period a few months earlier. In the assessment proceedings this explanation was not accepted and on the materials available, a finding was reached that the alleged sales to the employees and villagers were not proved but the sales were directly made to certain dealers at the market rate, which was higher, and not the circular rate and delivery of the bales of yarn was made by the mill to the dealers directly at the premises of the mill. Such evidence as the assessee produced in support of its explanation was disbelieved. It was accordingly held that the profits referable to the sales were not brought into the books of the assessee. It was in consequence of this finding that the additions amounting to Rs 77,641 were made to the assessee's chargeable profits for the year. In the penalty proceedings, for 1949-50 both the Income-tax Officer as well as the Appellate Assistant Commissioner were of the view that the profits out of the sales were really made by the assessee, that no portion of the profits enured to the benefit of the mill labourers as claimed by the assessee, that the alleged sales to labourers were spurious transactions and that the profits referable to these transactions were suppressed from its books. A penalty of Rs. 32,000 as

1. (1966) 1 I.T.J. 693: (1966) 1 M.L.J. 516· (1965) 58 I.T.R. 795.

reduced by the Appellate Assistant Commissioner with whom the Tribunal agreed was levied on that The Tribunal was satisfied that the profits made on the transactions had been kept back from the books and considered that the assessee would, therefore, be liable to penalty under section 28 (1) (*c*) of the Income-tax Act.

Before the High Court, the contention for the assessee was that section 28 being a penal provision, the burden was entirely on the Department to show that the assessee had concealed the particulars of its income or deliberately furnished inaccurate particulars of such income and that this burden had not been discharged. It was also argued for the assessee that the conclusion in the assessment proceedings to make an addition to the profits was arrived at on balancing of the value of evidence and of the probability and that this will not suffice but a higher degree of proof is required in finding concealment. It was further contended for the assessee that concealment of particulars of income should be proved beyond doubt by the Department which, according to the assessee, the Department had failed to do here. We are not satisfied that, in the circumstances of this case, we can accept this argument.

That section 28 of the Income-tax Act is penal in character can admit of no doubt Penalty is additional levy made to penalise concealment of particulars of income or deliberate furnishing of inaccurate particulars of such income. It is in addition to the taxes charged on the total income and is a multiple of the tax sought to be avoided by concealment or giving deliberately inaccurate particulars of such income. The object of this levy is not only to punish but also to discourage the particular vice which constitutes the *mens rea* The section itself will be attracted only where the specified officer or Tribunal is satisfied that there is concealment or deliberate furnishing of inaccurate particulars of the income. The section also provided that no order thereunder shall be made unless the assessee has been heard or given a reasonable opportunity of being heard A further provision it has made is that no prosecution for an offence against the Act can be instituted in respect of the same facts on which a penalty has been imposed under the section Any proceeding under this section will only be with the previous approval of the Inspecting Assistant Commissioner. The quantum of penalty itself may extend to one and a half times the taxes sought to be avoided by concealment or deliberately giving inaccurate particulars of the income These provisions in section 28 as well as the nature of the penalty clearly point to the proceedings thereunder being highly penal in character There are numerous authorities in support of this view and it will suffice to refer to a recent judgment of this Court in *M. Hussain Ali & Sons* v. *Commissioner of Income-tax, Madras*[1] to which one of us was a party.

The penal character of the proceedings in section 28 necessarily implies a strict construction and unless the requisites of the levy are clearly established, there could obviously be no levy. The burden of proof is, therefore, naturally on the Department to prove beyond doubt that there has been a concealment or deliberate furnishing of inaccurate particulars of the income. As pointed out by Lord Denning in *Miller* v *Minister of Pensions*[2] proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Noble Lord observed :

> " If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice "

It may be seen that proof beyond reasonable doubt means that there must be a higher degree of probability than what is implied in the discharge of burden of an issue in a civil case. In a civil case the evidence relating to a point at issue is assessed and balanced on broad lines and the decision rests on a reasonable

1. (1965) 1 I.T J 618 : (1965) 1 M L J. 543 (1965) 58 I.T R. 787.

2. (1947) 2 All E R 372 (1948) 117 L.J.R. 203.

degree of probability. That is where lies the dividing line between the extent of probability in a civil case and a criminal case While in a civil case a reasonable degree of probability may support a decision, a higher degree of probability is required in a criminal case. The demarcation of the difference between a civil and a criminal case was accepted by this Court as correct in *P. K Kalasami Nadar* v. *Commissioner of Income-tax, Madras*[1] and the principle was applied to the proceedings under section 28 of the Income-tax Act. The learned Judges there said .

"Treating the penalty proceedings under the Indian Income-tax Act as being more in the nature of criminal proceedings than civil proceedings, we can say that the facts must establish higher degree of probability of the assessee being guilty of the charge against him and nothing more and, of course, nothing less Imaginary possibilities ought not to be assumed to weaken the conclusion which is the result of a fair interence from the materials on record Any rigid standard of proof in these matters cannot be laid down and we are hesitant to embark on such a venture"

With respect we share this view.

While on the question of burden it is argued for the assessee that the order of assessment is not conclusive on the question of levy of penalty but the question will have to be approached and decided on the basis of material independent of the assessment order We are of the view that having regard to the requirements of section 28 of the Act and the nature of the finding which the specified officer should arrive at in order that he might have jurisdiction and might properly levy penalty, the nature and area of the enquiry in proceedings for that purpose and for assessment of income-tax are not common In computing and adding income or escaped income chargeable to tax, the assessing officer is not concerned with the specific question of deliberate withholding of particulars of income or concealment of such income but only with the question whether the income which is liable to tax has been left out and has, therefore, to be added or brought to tax. Moreover before a penalty is levied, section 28 also requires that the assessee must be heard or given a reasonable opportunity of being heard on the specific questions germane to the purpose and relevant to the requirements of that section. There is, therefore, no doubt that section 28 contemplates an independent proceeding which is not concluded by an order of assessment or any observations contained therein. This Court considered the question in *M Hussain Ali & Sons* v *Commissioner of Income-tax, Madras,*[2] and held that the determination of the income to be added in the assessment or reassessment proceedings was not final in so far as the imposition of penalty under section 28 was concerned and that it would be open and within the competence and jurisdiction of the Income-tax Officer to examine the matter afresh and to determine the liability to penalty. It was further explained that the estimated addition in the assessment proceedings could not by itself form the real basis for the determination of the quantum of penalty because what the Income-tax Officer has to take note of is that part of the income, actual or estimated, that had been concealed deliberately which would furnish the basis for ascertaining the penalty. The learned Judges said .

"It is clear from the wording (of the section) that it is not in all cases where an addition is made to the returned income of the assessee owing to defects in his accounts or for other reasons that the penalty provision is attracted. The officer has to be satisfied that there has been a deliberate concealment or furnishing of inaccurate particulars and that was done with a view to avoid the levy for the proper quantum of tax It is this finding that gives him the jurisdiction to impose the penalty, and the section says that the penalty shall be a certain multiple of the amount of income tax or super-tax which would have been avoided Normally, this section is invoked only on the finalisation of the assessment or reassessment proceedings By that stage, the Income-tax Officer would already have made an order directing the addition of any amount to the returned income on the basis that such income so added represented the income of the assessee which had been concealed . It may be that in cases where an addition is made to the returned income, it is not the entirety of such addition that may represent deliberate concealment, part might be deliberate and part might be due to inadvertence or accidental omissions What the section accordingly requires the Income-tax Officer to do is to take note of that part of the income (actual or estimated) that had been concealed deliberately, and it is that that would furnish the

1. (1962) 46 I.T R 1056, 1063
2. (1965) 1 M L J 543 (1965) 1 I T J. 618, 620 : (1965) 58 I.T.R 787.

basis for ascertaining the quantum of the penalty to be imposed ... what we are endeavouring to emphasise is that the determination of the income to be added in the assessment or reassessment proceedings is not final in so far as the imposition of the penalty under section 28 is concerned "

With respect we accept that these observations express the correct view and, as observed by the learned Judges themelves there is ample authority in support of it some of which the learned Judges themselves referred to and which we do not propose to cover over again. But there is one point which has to be adverted to, namely, as to whether and as to how far an assessment order or reassessment order which made an addition to the taxable income can be taken as *prima facie* evidence in penalty proceedings. In *P K Kalasami Nadar* v. *Commissioner of Income-tax, Madras*[1] Jagadisan and Srinivasan, JJ. in the course of their judgment observed :

" But the department is not precluded from relying upon the finding in the assessment proceedings to establish, *prima facie*, that the cash credits represented his income."

The Gujarat High Court in *Commissioner of Income-tax, Gujarat* v. *L. H. Vora*[2] dissented from this observation and expressed the view :

" The view of the Madras High Court that a finding in the assessment proceedings that a certain receipt is undisclosed income would *prima facie* establish that the disputed amount is income of the assessee unless it is shown by the assessee in the penalty proceedings to be incorrect, would amount to throwing the burden of proof upon the assessee The proceedings being of a penal nature and the burden being upon the department, it would be but legitimate to say that mere falsity of an explanation given in assessment proceedings would not necessarily lead to the inference that the disputed amount represented income, and that, besides that circumstance, there must be some additional material from which the Income-tax Officer has to satisfy himself whether the assessee was guilty of the charge against him under section 28."

In *Dwarka Prasad Sheokaran Das* v. *Commissioner of Income-tax, U P., Lucknow*[3] the Allahabad High Court considered that the Income-tax Officer in proceedings under section 28 could use the findings of the assessment proceedings as materials for arriving at the findings in the penalty proceedings for the purpose of levying penalty and that there was nothing anywhere in law laying down that such material was to be inadmissible in the penalty proceedings At the same time, that Court took care to point out that findings given during assessment proceedings could not operate as *res judicata* in proceedings for imposition of penalty, as the considerations which applied for giving a decision in the two proceedings were not identical. This view seems to have been adhered to by that Court in *Haji Abdul Rahman Abdul Qayum* v. *Commissioner of Income-tax, U. P.*[4] where it said :

" A finding arrived at in assessment proceedings that a certain income was not disclosed in the return and that it was therefore undisclosed income is material sufficient to support a finding to be reached in penalty proceedings that income had been concealed, though such material is not conclusive and can be rebutted "

The High Court of Kerala is of a like view in *Maney & Co* v. *Commissioner of Income-tax, Kerala*[5] There, that Court held that while the assessment order could not operate as *res judicata* because of the essential difference between the two types of proceedings, the evidence in the assessment proceedings would be relevant and admissible material in penalty proceedings. We are of opinion that the relevancy to and the evidentiary value in penalty proceedings of an assessment order will depend on the kind of findings and the materials on which they were based The scope of the two proceedings being different, it is obvious that the findings in an assessment order may not conclude the assessee in the penalty proceedings Often materials for both the proceedings may be identical. In the course of making additions to chargeable income either in assessment or reassessment proceedings, it is possible that observations relating to concealment or deliberate furnishing of inaccurate particulars are incidentally made though they are not necessary for the purpose of making the addition. We

1. (1962) 46 I T R 1056, 1063
2. (1965) 56 I T R. 126
3. (1953) 24 I.T.R. 410 : (1954) I.L.R. 1 All 559
4. (1965) 56 I T R. 172.
5. (1963) 47 I.T.R. 434.

do not see why such observations, provided they are based on materials, are not relevant and may not furnish *prima facie* evidence to prove the charge under section 28. It is of course true that such evidence is not conclusive in penalty proceedings and it will be quite open to the assessee to show that the observations in the assessment or re-assessment orders are not supported by material or otherwise unsupportable. While in proceedings under section 28, the specified officer should reach a finding necessary to exercise jurisdiction to levy penalty, where he has, though incidentally, already reached a conclusion on the matter in the light of the materials in the assessment or reassessment proceedings, it may be permissible in the penalty proceedings to refer to that as *prima facie* evidence, provided the assessee has had an opportunity or been given a reasonable opportunity to test it and show that such a conclusion is incorrect or is not supported by material. In doing so, he can place further material in the penalty proceedings. For instance, where on the facts found in the assessment or reassessment order, concealment is so patent, we do not see why the Income-tax Officer cannot rely on that in the penalty proceedings and call upon the assessee why in view of that, penalty should not be levied. Such a procedure, as we think, does no violence either to the nature of the penalty proceedings or the burden arising thereunder or to the principle that penalty proceedings being of a character different from that in assessment or reassessment proceedings, findings in the latter cannot be conclusive or operate as *res judicata* in the penalty proceedings We should like to repeat that the question whether the findings in assessment or reassessment proceedings can be used as *prima facie* evidence in penalty proceedings will depend upon the facts and circumstances of each case and whether such findings are based on material and on a high degree of probability.

It was suggested for the Revenue that because penalty levied under section 28 was in the nature of an additional tax as was held in *C A Abraham* v. *Income-tax Officer, Kottayam*[1] the nature of the proceedings under that section should be held to be not essentially different from the assessment or reassessment proceedings except regarding the quantum of profits. Learned Counsel for the Revenue argues that the question that a finding for the purpose of section 28 does not turn on any abstract conception of burden or onus of proof, but what is relevant to it is the rule of high degree of proof. But at the same time, he has to concede that what is sufficient for assessment proceedings is not sufficient for penalty proceedings, though the converse may be true It should be remembered that though penalty may be in the nature of additional tax, the levy is of a penal character. We have already pointed out that the nature and scope of enquiry and the findings that should be arrived at in the two proceedings are not common and that though the findings in assessment or reassessment orders may be relevant and may even be *prima facie* evidence in proceedings under section 28, they are by no means conclusive in the latter proceedings Learned Counsel for the assessee argues that, in the instant case, the findings in the assessment proceedings which led to the addition of the income were based on evaluation of evidence and broad probabilities and it could by no means be said that they satisfied the rule of higher degree of proof applicable to penalty proceedings. Learned Counsel for the assessee points out that it did not necessarily follow from the findings in the assessment proceedings that the assessee concealed any income or deliberately furnished inaccurate particulars of such income. We are not persuaded that we can accept this contention We have in *Gnanambika Mills Limited* v. *Commissioner of Income-tax*[2] held that the Department was justified in finding that the sales to labourers alleged by the assessee were a make-believe affair to circumvent the circular of the South Indian Mill Owners' Association to sell yarn bales at the Association rates and to secrete the surplus amount realised by them from the ultimate purchasers without bringing them into its

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1. (1961) 41 I T R 425: (1961) 2 S C R 765: (1961) 1 M L J (S C) 183 (1961) 1 S C J. 673: (1961) 1 An. W R (S C) 183.

2 (1966) 1 M L J. 516: (1966) 1 I T.J. 693: (1965) 58 I.T R. 795

books of account. We are, therefore, of the view that the facts of the case do attract section 28.

The question under reference is answered against the assessee and in favour of the Department with costs.

V. S ——— *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. VENKATADRI

S S. Sivan Pillai and others .. *Applicants**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act, (XI of 1922), sections 10, 15-C and 24—Industrial undertaking—Company—Shareholders, assessees—Dividends paid by company—Assessability in the hands of assessees—Profits of an industrial undertaking—Exemption—Profits—Computation—Allowances—Current year's depreciation and additional or extra depreciation, only to be allowed—Set-off of losses and unabsorbed depreciation—Not to be allowed

The assessee, shareholders in a company, claimed exemption from tax on the dividends paid by the company, an industrial undertaking, in view of section 15-C of the Act The Officer, however, included the dividends in the assessment On appeal the Appellate Assistant Commissioner directed rectification if the computation of the company's income under section 10 for the relevant year resulted in a profit In another set of appeals relating to the next assessment year, another Appellate Assistant Commissioner held dismissing the appeals, that section 15-C (4) would be attracted only if there was income of the industrial undertaking, on which tax was not payable and that in the computation of the income of the company, the unabsorbed depreciation that fell to be allowed under section 24 had to be taken as having been allowed under section 10 itself On further appeals by both the assessees and the Department, the Tribunal confirmed the latter view of the Appellate Authority and dismissed the appeals filed by the assessees. On a reference under section 66 (1) made at the instance of the assessees,

Held, that the profits and gains of an industrial undertaking, for purposes of section 15-C (1) and (4) have to be computed only in accordance with section 10, and that is, confining the allowances to section 10 (2) (*vi*) and (*vi-a*) and without taking into account either the unabsorbed depreciation for the previous years under section 10 (2) (*vi*) or (*vi-a*) or the unabsorbed's losses under section 24 The unabsorbed depreciation under section 10 (2) (vi) cannot be allowed in computing the profits or gains, because proviso (*b*) to that clause explicitly makes the deemed allowances subject to clause (*b*) of the proviso to sub-section (2) of section 24 In effect, in computing the profits or gains for the purpose of section 15-C (1) and (4) the only allowances that could be made in respect of current profits are current year's depreciation under section 10 (2) (vi) and current years additional or extra depreciation under section 10 (2) (*vi-a*) The set-off of losses under section 24 (2) and allowances in respect of unabsorbed depreciation both under section 10 (2) (*vi*) and 10 (2) (*vi-a*) would not enter into the computation under section 15-C(3).

It is true that when the net result of assessment on the company is taken there is nil profit and there might be no occasion at all for the application of section 15-C But it does not follow from it that on that ground the benefit of that section can be denied to the shareholders if on a computation of the profits and gains of the industrial undertaking under section 15-C (3) the company had made profits out of which dividends had been paid to its shareholders

Cases referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922) in R A Nos. 1000 of 1961-62, 1001 and 1002 of 1961-62 , 1003 and 1004 of 1961-62 and 1005 and 1006 of 1961-62 (I T A Nos 6154 of 1957-58 ; 5485 of 1956-57 and GIOR of 1957-58 ; 8482 of 1956-57 and 6132 of 1957-58 , Assessment years 195 -57 , 1955-56 and 1956-57, 1955-56 and 1956-57 and 1955-56 and 1956-57) respectively on its file for decision on the following question of law viz —

" Whether on the facts and in the circumstances of the case, the assessees are entitled to the benefit of section 15-C (4) in respect of the dividend income received from Sri Ganapathy Mills Co , Ltd , Tirunelveli ? "

V. Srinivasan, for Applicants

V Balasubramanyan, Special Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J—These four references involve the interpretation of section 15-C of the Income-tax Act, 1922, and the scope of exemption available to shareholders in receipt of dividends The assessment proceedings right through

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*T C Nos 198 to 201 of 1962 and Ref Nos. 114 to 117 of 1962 — 3rd August, 1965

have proceeded on the assumption that Sri Ganapathy Mills Company Limited, Tirunelveli, is a new industrial undertaking as defined by section 15-C (2) but the status of the company as such has not been determined so far in the assessment proceedings The four assessees before us are shareholders of this company and received dividends from it during the calendar years 1954 and 1955, relevant to the assessment years 1955-56 and 1956-57 These dividends were included by the Income-tax Officer in the assessments of the shareholders notwithstanding their claim that they were entitled to exemption from tax under section 15-C in their hands They preferred appeals and the first series of them relating to the assessment year 195 -56 were allowed by the Appellate Assistant Commissioner on the view that set-off of earlier losses was not part of the computation of the income under section 10 and should not affect the applicability of section 15-C. He, therefore, directed rectification of the assessments after the Income-tax Officer satisfying himself that the company was an industrial undertaking entitled to the benefit of exemption under section 15-C and that the computation of the company's income under section 10 for the relevant assessment year resulted in a positive figure Another set of appeals relating to the next assessment year were disposed of by a different Appellate Assistant Commissioner who, however did not agree with that conclusion of his predecessor but held that section 15-C (4) would be attracted only if there was income of the industrial undertaking on which tax was not payable He considered that, in the computation of the income of the company, the unabsorbed depreciation that fell to be allowed under section 24 had to be taken as having been allowed under section 10 itself. On that view, he dismissed the appeals Both the Department and the assessees filed further appeals before the Tribunal For the assessees it was contended that computation of income or profits for purposes of section 15-C should be made only in accordance with section 10 as directed by section 15-C (3), and into such computation the carry forward losses, including previous years' unabsorbed depreciation under section 10 (2) (*vi-a*) would not enter. On the other hand, for the Department it was stated before the Tribunal that it was unnecessary to look into the provisions of section 15-C (3) when section 15-C (4) itself provided the basis for the grant of relief and that when in both the years only losses had accrued and there was no profit or gain on which tax was payable, the assessees were not entitled to the benefit under section 15-C (4). In support of this contention the Department relied on *Indo-Commercial Bank Limited* v. *Commissioner of Income-tax, Madras.*[1] The Tribunal substantially accepted the contention for the Department and disposed of the appeals on that basis. The Tribunal's reasoning is as follows :—

" It is clear that the condition precedent for availability of relief to the assessee under section 15-C is as stated in section 15-C (1) It is also manifest that in the two relevant years there is no amount on which the company is exempt from tax. If only out of this amount, dividends are paid or they are attributable to profits, by themselves, exempt under section 15-C (1), that the benefit of section 15-C (4) accrues to the assessee When there is no such amount, there is no exemption under section 15-C (4)."

In taking that view, the Tribunal also considered sub-section (3) of section 15-C, and in its view its effect was only this :

" No doubt it is true that section 15-C (3) requires the profits and gains of an industrial undertaking, to which that section applies, to be made in accordance with the provisions of section 10 But, as pointed out by the Appellate Assistant Commissioner, in arriving at the final profits, the carry forward of losses under section 24 (2) is mandatory In other words the fact of such carry forward of an unabsorbed depreciation under section 10 (2) (*vi*) of other losses would in effect amount to computation of income under section 10 "

In the circumstances, at the instance of the assessees, the Tribunal has referred to us the following question :

" Whether on the facts and in the circumstances of the case, the assessees are entitled to the benefit of section 15-C (4) in respect of the dividend income received from Sri Ganapathy Mills Company Limited, Tirunelveli ?"

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1. (1962) 44 I T R 22.

For the assessment years 1954-55 and 1955-56, the company was held in the assessment proceedings not to be entitled to the benefit of section 15-C, as its applicability did not arise because the net result in the assessment was a loss after carry forward of previous years' losses. For the first year it was found that the company made a profit of Rs 88,184 after allowing depreciation admissible under section 10. But this was reduced to "nil" amount in view of allowances of depreciation losses of previous years and the net result was a sum of Rs. 1,96,159 was carried forward on account of the depreciation losses. For the second assessment year too, the company made a profit and after giving depreciation allowances, it came to Rs. 1,95,012 Setting off the unabsorbed depreciation, a sum of Rs. 1,147 had still to be carried forward. Thus, in both the years the net result of the assessments showed "nil" profits.

The contention for the assessees is that they are entitled to the benefit of section 15-C (4) on the basis of computation made under sub-section (3) of that section, which means, that in arriving at the profit no allowance should be made for carry forward losses, including unabsorbed depreciation for previous years under section 10 (2) (vi). Their learned Counsel further argues that merely because in the assessment of the company "nil" profit was arrived at, and therefore, there was no occasion for the application of section 15-C (1) to it, it does not necessarily follow from it that the assessees are not entitled to the benefit of section 15-C (4). So far as they are concerned, they having nothing to do with the assessed profits or losses of the company, for purposes of exemption to them under section 15-C, not the overall result of the assessment but a part of it relating to the new industry and that too as computed in accordance only with the provisions of section 10 should be taken as the basis On the other hand, learned Counsel for the Revenue has reiterated the contention before the Tribunal. He has pressed before us that the scope of exemption under section 15-C (4) is dependent upon and conditioned by there being profits of the industrial undertaking on which tax is payable but for the exemption under section 15-C (1), subject, of course, to the ceiling fixed by that provision and that if the assessment of the company resulted in a loss, there is no question of the application of section 15-C at all In such a case, he urges, no exemption is contemplated by section 15-C (4). This submission for the Revenue obviously involves the idea that profits or gains of an industrial undertaking under sub-section (1) of section 15-C would be what have been arrived at after applying the entire machinery of assessment, including section 10 and the set-offs and carry forward under section 24.

We must confess that we have not found it easy to determine the precise scope of the exemption under section 15-C (1) and (4) and the true significance of sub-section (3). Section 15-C relates to exemption from tax of newly established industrial undertakings. The policy behind the section appears to be to grant tax concessions to such industries subject to prescribed limits, apparently with a view to encourage and sustain them. The exemption contemplated by the section is of tax on so much of the profits or gains derived from any industrial undertaking to which the section applies as did not exceed 6 per cent. per annum on the capital employed in the undertaking, the capital being computed in accordance with such rules as may be made for the purpose by the Central Board of Revenue. What sort of industrial undertaking would be entitled to the benefit of section 15-C is defined by sub-section (2) and the proviso to this sub-section empowers the Central Government to direct by notification that the exemption conferred by the section shall not apply to any particular industrial undertaking Sub-section (3) says that profits or gains of an industrial undertaking to which the section applies shall be computed in accordance with section 10. Then comes sub-section (4).

"The tax shall not be payable by a shareholder in respect of so much of any dividend paid or deemed to be paid to him by an industrial undertaking as is attributable to that part of the profits or gains on which the tax is not payable under this section"

It may be seen that section 15-C (1) is confined to a part of the profits or gains of an assessee which relates to those of an industrial undertaking and is therefore, limited to a segment of the computation for purposes of total assessment. Sub-section (3) clearly points to that and directs that the profits or gains of an industrial undertaking to which the section applies, should be computed in accordance with the provisions of section 10. We are aware that section 10 is a general section not confined to the computation of profits or gains of an industrial undertaking. Section 10 pertains to the computation of income under the head of profits and gains of business, profession or vocation. Even without a provision like sub-section (3) of section 15-C, section 10 would have been applicable to the computation of such income. If so, why does sub-section (3) of section 15 specifically direct that the profits or gains of an industrial undertaking, to which the section is applicable, should be computed in accordance with section 10 ? In our opinion, the intention of the sub-section appears to be that for purposes of computing the profits or gains of an industrial undertaking to which section 15-C applies, the computation thereof should only be confined to the provisions of section 10, that is to say, the profits or gains of an industrial undertaking should be computed in accordance with the provisions of section 10. To put it differently, no other consideration, like section 24, can enter into the computation of the profits or gains of an industrial undertaking to which section 15-C applies. Profits or gains, for purposes of this section, therefore, in our view, are not net result of a computation on an application of the entire machinery of assessment. When the section speaks of profits or gains derived from an industrial undertaking, it does not appear to us that it has relation to the total results of assessment on the company, which are arrived at after making deductions, allowances and set-off of carry forward losses.

It is contended for the Department that the words "tax is not payable under this section" in sub-section (4) of section 15-C contain an unmistakable indication that profits or gains of an industrial undertaking are related to the assessed profits or gains of such an undertaking, and that therefore if the assessment results in a negative figure or loss, there is no occasion for the application of section 15-C (1). It must follow from this that there would be equally no occasion to the application of sub-section (4) of that section in that event. Learned Counsel for the Reveuue argues that it is only where dividends have been paid out of profits or gains of an industrial undertaking which are exempt from tax subject to the limit, that exemption under sub-section (4) of section 15-C would come into play. We are unable to accept these contentions. Neither sub-section (1) nor sub-section (4) is a charging provision. Both of them relate to exemption from tax within limits. The words "tax is not payable under this section" in sub-section (4) are merely indicative of the scope of the exemption under sub-section (4) which is no different or no less or more than that under sub-section (1). On our view of the effect of sub-section (3), it would follow that profits or gains of an industrial undertaking, for purposes of section 15-C (1) and (4) have to be computed only in accordance with section 10, and this is, confining the allowances to section 10 (2) (*v*) and (*vi*) (*a*), and without taking into account either the unabsorbed depreciation for the previous years under section 10 (2) (*vi*) or (*vi*) (*a*) or the unabsorbed losses under section 24. We are of the view that even the unabsorbed depreciation under 10 (2) (*vi*) cannot be allowed in computing the profits or gains, because proviso (*b*) to that clause explicitly makes the deemed allowances subject to clause (*b*) of the proviso to sub-section (2) of section 24. In effect, in computing the profits or gains, for the purpose of section 15-C (1) and (4) the only allowances that could be made in respect of current profits are current year's depreciation under section 10 (2) (*vi*) and current year's additional or extra depreciation under section 10 (2) (*vi-a*). The set-off of losses under section 24 (2) and allowances in respect of unabsorbed depreciation both under section 10 (2) (*vi*) and 10 (2) (*vi*) (*a*) would not enter into the computation under section 15, (3).

It is true that when the net result of assessment on the company is taken there is "nil" profit and there might be no occasion at all for the application of section 15-C But, in our view, it does not follow from it that on that ground the benefit of that section can be denied to the shareholders if on a computation of the profits and gains of the industrial undertaking under section 15-C (3) the company had made profits out of which dividends had been paid to its shareholders. Where the company has "nil" profits under its final assessment, the non-application of section 15-C is not due to the fact that it made no profits and it was not entitled to the benefit of section 15-C (1). But, in view of the overall result of the assessment, there is no need for the company to claim exemption under that provision, as there is no tax liability at all Viewed from this angle, we consider that the shareholders are entitled to take the position of the profits or gains of the company as computed under sub-section (3) of section 15-C and subject to the limits provided by that sub-section, and claim the benefit under section 15-C (4).

Learned Counsel for the Revenue strongly relied on *Indo-Commercial Bank Ltd* v *Commissioner of Income-tax, Madras*[1] and pressed before us that "profits" in sub-section (4) of section 15-C refer only to assessed profits attributable to the industrial undertaking, whose profits are exempt from tax under section 15 C (1) We do not think that this case is of assistance to the Revenue. The scope of sub-section (3) of section 15-C and its bearing on the computation of profits and gains of an industrial undertaking, for the purpose of that section, did not arise and has not been considered in that case. It does not appear from the facts in that case that there was any question of carry forward losses or even unabsorbed depreciation under section 10 (2) (*vi-a*) entering into the computation of profits or gains of the industrial undertaking there. In that case the assessee held certain ordinary and preference shares in India Cements Limited, from which it received certain dividends for the current years 1951 and 1952. They were assessed by the Income-tax Officer as income from "other sources" for the assessment years 1952-53 and 1953-54. On appeal the Appellate Assistant Commissioner held that since the dividends were declared out of commercial profits of the company, and as the company did not suffer any tax as all its profits had been wiped off by depreciation, and there was no assessment on the company, the question of granting exemption to the dividends did not arise. It is not clear from the report whether this wiping off by depreciation related to unabsorbed depreciation or current depreciation. The question this Court had to consider in that case was whether the dividends received from the company, no part of whose income has been specifically exempted under section 15-C, was exempt in the hands of the assessee under section 15-C (4)

The answer was in those words:

> " What is exempted by section 15-C (4) is dividends paid out of or attributable to profits which are themselves exempted from taxation under section 15-C (1). The expression 'profits or gains on which the tax is not payable under this section' in section 15-C (4) can refer only to assessed profits, the assessed profits attributable to the industrial undertaking, whose profits are exempt from tax under section 15-C (1)".

These observations, if we may say so with respect, should be understood in the context of the facts in that case. We do not understand the learned Judges in that case as laying down that the position would be the same even in cases where the profits of the company had been absorbed by making allowances for unabsorbed depreciation, both normal and extra, under section 10 (2) (*vi*) and (*vi-a*) and setting off carry forward losses of either category In any case, on the facts in that case, the learned Judges had not to consider the scope of computation of profits or gains of an industrial undertaking under sub-section (3) of section 15-C.

The other cases cited before us *Ashok Motors Ltd.* v. *Commissioner of Income-tax*[2] and *Commissioner of Income-tax, Madras* v. *Standard Motor Products of India*

1. (1962) 44 I T R 22.
2. (1961) 41 I.T.R. 397.

Limited[1] do not bear precisely on the question we are called upon to answer. *Commissioner of Income-tax* v. *National Electrical Industries Limited*[2] only laid down that section 15-C did not provide for any deduction from the income the contention of the assessee in that case being that so much of the profits derived from the newly established undertaking to which that section applied as did not exceed six per cent. per annum on the capital employed in the undertaking were to be excluded in the computation of total income

We answer the question referred to us against the Department and in favour of the assessees with costs, which include the institution fee paid by the assessees. Counsel's fee Rs. 250 one set

We have not considered the question whether Sri Ganapathy Mills Co., Ltd. is a new industrial undertaking within the meaning of section 15-C (2). That is a matter for independent determination by the appropriate authority.

V S. *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED-KUTTI

K. R. Kothandaraman ... *Applicant**

v

Commissioner of Income-tax, Madras ... *Respondent.*

Income-tax Act (XI of 1922), *sction* 7—" *Salary*"—*Master and servant—Tests—Direction and control—Assessee, appointed managing director of a company under an agreement—Agreement—Exercise of powers and duties under the superintendence, direction and control of board of directors—Remuneration payable monthly—Remuneration credited monthly—Subsequent resolution passed after the account year stopping payment—No provision for denying or waiving remuneration under the agreement—Amount assessable as salary paid to servant—Doctrine of " real income "—Not applicable to income arising under head " salary "*

Company—Director—Manager—Director, not a servant of company—May be a servant under a special contract of service

The assessee, a promoter of a company, was appointed its managing director, under an agreement which appointed him for a term of five years, and provided that his powers and duties were to be exercised by him subject to the superintendence, direction and control of the Board of Directors and that the company shall pay to the assessee in respect of each year of account of the company, a monthly remuneration of Rs 1,250 In addition, a commission at a percentage of the profits was payable at the end of the year The accounting year of the company was the calendar year, while that of the assessee was the financial year The assessee included the monthly remuneration in the prior assessment year under the head " salary " and was accordingly assessed Though the company was crediting the assessees accounts with the monthly remuneration, on the 31st December, 1959, debited the assessee with the sum of Rs 15,000 representing the salary for a year, said to be in pursuance of a resolution of the company dated 9th May, 1960 to the effect that in view of the company not making any profits, the company decides to stop payment of remuneration to the managing director For the assessment year 1960-61 the assessee claimed that the amount of remuneration is not assessable as he was not entitled to it in view of the resolution of the company The Income-tax Officer however rejected the claim and assessed him on the sum of Rs 11,250, the Appellate Assistant Commissioner allowed the claim while the Tribunal disallowed the claim On a reference under section 66 (1)

Held, that the sum is assessable under section 7 of the Income-tax Act, as salary received by the assessee as the employee of the company under the agreement

A master is one who not only directs what and when a thing is to be done but how it should be done. This test may not be necessarily the only test and one has to take note of various changing factors in human and industrial relationships which regulate and change or alter the concept of the relationship of master and servant

The term " manager " as defined in the Companies Act of 1965 includes also a director or any other person occupying the position of a manager by whatever name called, and whether under a contract of service or not It may be that a director of a company only by reason of that capacity will not be a servant of the company But there is nothing to prevent him from being a servant of the company too under a special contract of service which he may enter into with the company

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1. (1962) 46 I.T R 14.
2. (1959) 61 Bom L R. 380 : I L R 1960 Bom 133.

*T.C No 172 of 1963 24th November, 1965.

It may be that the concept of a servant may, in a sense, involve an element of agency but on that account, a servant is not to be regarded as an agent, and an agent is never a servant

The doctrine of "real income" in the context of commercial expediency cannot be extended to the receipt of or accrual of salary which is liable to tax under section 7 of the Income-tax Act.

Where the salary had accrued to the assessee under the contract of service, immediately upon the closing of the account year, and where the agreement did not provide for waiver of any part or whole of the remuneration and also did not reserve power to the employer to decide that the assessee should forego any part of the remuneration which had accrued to him, any such denial, with drawal or waiver subsequent to such year, would not preclude the assessment of the amount under section 7 of the Act as salary

On the facts—The terms of the agreement and the functions assigned to the assessee and the reservation to the Board of Directors of the right of superintendence, direction and control show that the relationship between the company and the assessee is that of an employer and an employee The payment of remuneration is not subject to any exception and the agreement does not provide for the Board of Directors by a resolution to stop or deny payment of the remuneration The resolution as worded does not purport to withdraw the salary already accrued to the assessee Even if the resolution can be read as withdrawal it would only amount to a kind of disposal by the assessee, if he agreed to accept the resolution The remuneration for the period of nine months has been rightly brought to tax

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act (XI of 1922) in R A. No 398 of 1962-63 (I T A No 398 of 1962-63 assessment year 1960-61)

K. Srinivasan, for Applicant

V Balasubrahmanyan, Standing Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J—The assessee is the managing director of a public limited company called "Transformer and Switchgear Ltd" He was the promoter of the company and would appear to have established contacts with experts in a German concern in the particular type of business The company was incorporated on 28th November, 1956 Article 106 of the memorandum and articles of association provided for the appointment of the assessee as the managing director of the company for a period of five years subject to the control and supervision of the Board of Directors and upon the terms, provisions and conditions as to remuneration and management as specified in the agreement to be executed between them. Pursuant to this article, they did enter into an agreement on 22nd May, 1957 The preamble referred to the services of the assessee in promoting the company and his experience in the line of business and by clause (1) he was appointed as the managing director of the company for a period of five years from the date of its incorporation Clauses (2) to (4) and clause (9) defined his powers and duties as a managing director which were to be exercised by him subject to the supervision, direction and control of the Board of Directors and also subject to the provisions of the memorandum and articles of association In consideration thereof and subject to the relative provisions in the Companies Act, 1956, and of the services to be performed by the managing director, clause (5) provided that:

"the company shall pay to the managing director in respect of each year of account of the company a monthly remuneration of Rs 1,250 plus commission at the rate of five per cent on the net profits made by the company"

The commission was to become due and be paid to him yearly and he would be entitled to draw the same immediately after the annual accounts of the company of each year were made up by him and profits certified by the auditors of the company and the accounts were laid before the company in general meeting But this is subject to the provision that the managing director would be entitled to draw the minimum remuneration in monthly instalments not exceeding Rs 1,250 per month The assessee included the receipt of monthly remuneration in his Income-tax returns for the assessment years prior to the assessment year 1960-61 under the head of "salary" and he had been assessed accordingly The accounting year for the company is the calendar year and for the assessee, the financial year For the accounting year ended 31st December, 1959, the company credited to the assessee a remuneration of Rs 1,250 every month. But on 31st December, 1959, the company,

however, debited the assessee with a sum of Rs. 15,000 which represented the salary for the whole year. This was said to be pursuant to a resolution of the Board of Directors dated 9th May, 1960 which was :

"In view of the company not making any profit, the company decides to stop payment of remuneration of Rs 15,000 per annum to the managing director, Mr K R Kothandaraman, for the year 1959"

The assessee in respect of the assessment year 1960-61 claimed that he was not entitled to remuneration for the whole year of 1959 by virtue of the resolution and that the credit entries made month after month did not entitle him to remuneration in the circumstances This contention was rejected and the sum of Rs 11,250 credited to the assessee's account for nine months from April to December, 1959 was brought to tax The assessee succeeded in his appeal in relation to this amount, the Appellate Assistant Commissioner being of the view that, by reason of the company's resolution, the assessee was compelled not to demand the amount of remuneration and that such compulsion was the result of business expediency He was also of the view that there was no surrender of the remuneration because he was not entitled to any remuneration at all for the year ending 31st December, 1959 But the Tribunal, on appeal by the Revenue, reversed that decision The Tribunal held that, having regard to the relationship of the assessee with the company under the agreement, he must be regarded as a salaried employee and the remuneration credited to him for the nine months was salary chargeable to tax under section 7 of the Income-tax Act, 1922. It further held that as the resolution of the company was passed long after the accounting year of the assessee, it could not, in any event, abrogate the right of the assessee under the agreement, and literally read, the resolution had only the effect of stopping the payment of remuneration At the instance of the assessee, the reference has been made to us under section 66 (1) of the Act, of the following question

"Whether, on the facts and in the circumstances of the case, the sum of Rs. 11,250 is assessable under section 7 of the Income-tax Act ?"

Having regard to the frame of the question, we are not called upon to answer whether the remuneration for the nine months would fall within section 10 or section 12 The question is confined to whether the sum is assessable under section 7 Two aspects of this question have been presented to us on behalf of the assessee. (1) whether the sum represents salary, and (2) if it is salary, whether there was real income accrued to the assessee in that sum On the first aspect, the submission for the assessee is that the relationship of the assessee with the company is such that he could hardly be treated as an employee Under the terms of the agreement, he is invested with powers in the exercise of which he virtually carries on the business of the company. The indicia, according to the argument, which determine the relationship between a master and servant are lacking It is recognised by learned Counsel for the assessee himself that the solution to this question lies in the terms of the agreement We have already referred to Article 106 of the memorandum and articles of association which itself made the appointment of the assessee as the managing director but left the terms of the appointment to be regulated by an agreement The agreement no doubt invested the assessee with extensive powers of management covering the entire conduct and exigencies of the business. But provision was specifically made that he was to exercise his functions subject to the superintendence, direction and control of the Board of Directors and subject also to the provisions of the memorandum and articles of association It is true as was held in *Lakshminarayan Ramgopal & Son Ltd.* v *Government of Hyderabad*[1], that a master is one who not only directs what and when a thing is to be done but how it should be done. That is a principle often applied in distinguishing between an employee or a servant and an independent contractor, particularly in the field of industrial law But we are not certain that this test is necessarily the only test in deciding whether the relationship of master and servant exists, for one has to take note of various changing factors in human and industrial relationships which regulate and change or alter the concept of the relationship of master and servant Take, for instance, a driver of a private

1 (1955) S C J. 595 (1955) 1 S C R 393.

motor car. He is undoubtedly a servant of the employer but how often can it be said the employer tells the driver how to drive the motor car It is even conceivable that the employer may not know driving himself or even less about the mechanism of a motor car In such a case, however, one knows it as an obvious fact that the driver is a servant and is recognised as such by reference to other factors But even applying the test of *Lakshminarayan Ramgopal & Son Ltd* v *Government of Hyderabad*[1], we are satisfied that the terms of the agreement and the functions assigned to the assessee and the reservation to the Board of Directors of the right of superintendence, direction and control show that the relationship between the company and the assessee is that of an employer and an employee The Companies Act, 1956, under the provisions of which the company here was incorporated, defines the terms "director", "manager", "managing agent" and "managing director" Notwithstanding the nomenclature, it appears that, with reference to the terms of the agreement and the functions the assessee is called upon to exercise thereunder, he is virtually a manager but under the definition of a "manager" he has the management of the whole or substantially the whole of the affairs of the company It may be seen that the term "manager" as defined in the Companies Act, 1956 includes also a director or any other person occupying the position of a manager by whatever name called, and whether under a contract of service or not In this case, the agreement, in our view, cannot be construed as anything other than a contract of service It may be that a director of a company only by reason of that capacity will not be a servant of the company : *Commissioner of Income-tax, Bombay City* v *Lady Navajbai R J Tata*[2] but there is nothing to prevent him from being a servant of the company too under a special contract of service which he may enter into with the company.

Our attention is, however, invited by learned Counsel for the assessee to *Inder, chand Hari Ram* v *Commissioner of Income-tax*[3] and *Commissioner of Income-tax-Madras* v. *K R M T T. Thiagaraja Chetty & Co. Ltd*[4], which, as we think, are of no assistance to him They are both cases of managing agency and relate to commission payable to it In the first of these cases, the managing agency was a firm Under the memorandum and articles of association of the company of which it was the managing agent, it was entitled to a monthly allowance and a certain commission on sales of the company's products and on its profits. The firm contended that the income received as the managing agent of the company and as its sole selling agent should be assessed under section 7 of the Indian Income-tax Act but the Revenue would not admit it and charged the income under section 10. The Allahabad High Court on a reference upheld the view of the Revenue and pointed out that the question, in which capacity the sole agent was working, would depend upon the facts of each case *Commissioner of Income-tax, Madras* v. *K R M T T. Thiagaraja Chetty & Co Ltd*[4] was also a firm being the managing agent of a limited company, and under the managing agency agreement, it was entitled to a certain monthly remuneration, a commission of 10 per cent. on the net profits of the company and a small percentage on sales and purchases. During the year of assessment in that case, the assessee became entitled to a large amount by way of commission By a resolution, the Board of Directors decided to keep the entire commission in suspense without payment This sum was debited as a revenue expenditure of the company and was allowed as deduction in computing the profits of the company The question was whether the managing agent was liable to pay tax on the commission amount According to the Revenue, since the assessee followed the mercantile method of accounting, the income having accrued, it became assessable whether it was received or not. The Appellate Tribunal took a contrary view. But the High Court was of the view that there was no material for the Tribunal's finding that the assessee was being assessed on cash basis in previous years. The decision of the High Court was confirmed by the Supreme Court It was suggested in the course of the arguments before the Supreme Court that the managing agency

1. (1955) S C J 595 (1955) 1 S C R 393 706
2. I L R (1947) Bom 885 49 Bom L R 66
3. I L R (1953) All 564 A I R 1952 All
4 (1953) S C J 734 (1953) 2 M L J 823 : (1954) S C R 258

was not a business But the Supreme Court considered that this question was immaterial for the purpose of income-tax because of section 13 and so refrained from deciding the point. Even so, it pointed out, in passing, that the point was directly decided in *Inderchand Hari Ram* v *Commissioner of Income-tax, U P. and C P.*[1] to which we have made a reference. It may be seen, therefore, that *Commissioner of Income-tax, Madras* v. *K R M T T Thiagaraja Chetti & Company*[2] did not decide the question and does not help in deciding the question we are called upon to answer.

It may be that the concept of a servant may, in a sense, involve an element of agency but, on that account, a servant is not to be regarded as an agent; and an agent is never a servant. We have already held that, having regard to the terms of the agreement and the functions which the assessee exercised with reference to them, he should be regarded as a manager In any case, at best, he may be treated as a managing director under a contract of service Though a director simpliciter is not a servant of a company, when a managing director enters into an agreement of service, there is no reason why he should not be held to hold two capacities, one of them as an employee of the company In *Commissioner of Income-tax, Madras* v. *Nagi Reddy*[3], this Court was of the view that the remuneration received by a managing director was salary The question there was whether the remuneration received by the managing director of a concern carrying on a business was income from business assessable under section 10, or income from salary assessable under section 7, or income from other sources assessable under section 12 This Court stated that the answer depended on the nature of the activities and functions performed by the managing director The agreement between the assessee and the company, which was engaged in the production of films, provided that the assessee was appointed as managing director for ten years and was entitled to a monthly remuneration of Rs 500 Subsequently, a resolution was passed by the company by which the assessee became entitled to 12½ per cent of the net profits of the company in addition to the monthly remuneration Following *Lakshminarayan Ramgopal* v *Government of Hyderabad*[4], this Court, as we said, expressed the view that the remuneration was not income assessable under section 10 This Court observed that it was the nature and scope of the activity, and not the extent of the operations, which was relevant in determining the question and added at page 191 :

> "The remuneration of an agent is only the *quid pro quo* of the services rendered and however much such an agent may represent a business, he cannot be said to be carrying on a business."

We are in respectful agreement with these observations. In this case it was the company that was carrying no the business and the assessee was employed by the company in managing its affairs including the carrying on of its business We are of opinion, therefore, that the monthly remuneration credited to the assessee for the nine months in question represented his salary We are not concerned in this Reference with the nature of accrual to or receipt of the commission by the assessee and the capacity he held in relation to it. Though we do not exclude the possibility of a combination of a servant and an agent in one and the same person, this question too we do not decide as it is unnecessary

That takes us to the second aspect of the question. The argument for the assessee is that if section 7 applies, no salary accrued to the assessee during the relevant period. It is stated that, in view of the resolution of the Board of Directors, he became disentitled to payment of the salary and so the assessee had no vested right in the credit entries and that unless he had such rights, the mere book entries cannot be taken to be an accrual of salary to the assessee We are afraid that the argument proceeds on a wrong conception of the effect of the entries in the books of the company and of the resolution of the Board of Directors As we said, under the agreement dated 22nd May, 1957 the company shall pay to him a monthly remuneration of Rs. 1,250

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1 I L R (1953) All 564 : A I R 1952 All 706

2 (1953) S C J 734 (1953) 2 M L J. 823 (1945) S C R 258

3 (1963) 2 I T J 471 (1963) 2 M L J 571: I L R (1963) Mad 835 (1964) 51 I T R 178

4. (1955) S C J 595 : (1955) 1 S C R 393.

and he will be entitled to draw that remuneration every month. These are the words used in the agreement.

"... the company shall pay to the managing director....... in monthly instalments not exceeding Rs 1,250 per month"

This is not subject to any exception and the agreement does not provide for the Board of Directors, by a resolution, to stop or deny payment of this remuneration. It is no doubt true as held in *Commissioner of Income-tax, Kerala and Coimbatore* v. *L.W. Russel*[1], the word 'allowed' in section 7 of the Indian Income-tax Act, 1922 presupposes a vested right. But the agreement certainly conferred on the assessee a right at the end of the month to payment of the monthly salary. In fact, the folio relating to the assessee in the books of the company shows that practically at the end of every month a sum of Rs. 1,250 was credited to his account The entry on 31st December, 1959 is : "To M. D. Remuneration amount transferred........ Rs. 15,000" That would suggest not that the assessee had no vested right but the credit in his favour was transferred and not withdrawn which the company could not, as far as we can see, do under the terms of the agreement It is contended, perhaps rightly, that the book entries are not necessarily conclusive and it cannot invariably be said that the income results from such entries of credit But in the present context, we have no doubt that the entries in the folio page relating to the assessee in the books of the company did result in accrual of salary from month to month for the period in question *Commissioner of Income-tax, Bombay City* v. *Ms. Shoorji Vallabhdas & Co.*[2] is relied on by the assessee in support of a contention that it was open to the company to withdraw the salary by a resolution passed subsequent to the assessment year We do not think that the authority supports him, for, there the withdrawal was by a subsequent agreement between the assessee and the company and the agreement was during the assessment year itself It is then contended that on the principle or doctrine of the "real income" laid down in *Kashiparekh & Co., Ltd.* v *Commissioner of Income-tax*[3], it must be held that, in point of fact, there was no real accrual of salary, during the period in question, to the assessee. In that case, the assessee adopted the mercantile system of accounting The assessee was the managing agent of a paper mill company and under the terms of the managing agency agreement, the assessee was under a duty to forego one-third of his commission where the profits of the company were not sufficient to pay a dividend of six per cent. For the accounting year ended 31st March, 1950, the assessee earned a certain commission but, as a result of the resolutions passed by the company, the assessee gave up a considerable part of the commission in December, 1950 The Tribunal held that what was foregone exceeded the proportionate profit provided for in the agreement ; nevertheless it also found that the excess was given up for reasons of commercial expediency. The Bombay High Court held :

"It was the real income of the assessee-company for the accounting year that was liable to tax and the real income could not be arrived at without taking into account the amount foregone by the assessee In ascertaining the real income the fact that the asessee followed the mercantile system of accounting did not have any bearing The accrual of the commission, the making of the accounts, the legal obligation to give up part of the commission, and the foregoing of the commission at the time of the making of the accounts were not disjointed facts , there was a dovetailing about them which could not be ignored The real income of the assessee was Rs 27,644 and the amount of Rs 97,000 foregone by the assessee could not be included in the real income of the assessee for the accounting year."

It was further observed that the principle of real income was not to be so subordinated as to amount virtually to a negation of it when a surrender or concession or rebate in respect of managing agency commission was made, agreed to or given on grounds of commercial expediency, simply because it took place sometime after the close of an accounting year Relying on this decision, learned Counsel for the assessee argues that although the resolution of the Board of Directors was passed subsequent to the assessment year, it was passed on the ground of commercial expediency and on the same ground the assessee was justified in foregoing the salary for a period

1 (1964) 2 I T J 124 (1964) 2 S C J 332 Bom 35 62 Bom L.R. 667 : A I.R 1961
2. (1962) 46 I T R 144 (S C) Bom 84
3. (1960) 39 I T R 706, 707 I.L R. (1961)

of nine months. On that basis, it is said that there was really no accrual of salary to the assessee for the period. We are unable to accept this contention The Bombay High Court in that case was concerned with what was admittedly a business income. That was a case of assessment under section 10. Naturally, therefore, the question of business expediency in relation to a loss or expenditure for the purpose of the business would be germane We are unable to extend the doctrine of "real income" in the context of commercial expediency to receipt or accrual of salary which is liable to tax under section 7 On this view, it is unnecessary for us to deal with the other question whether each accounting or assessment year being an independent unit, withdrawal of income by a resolution subsequent to the assessment year would have any effect on the computation of income in such assessment year The point here is whether, where the salary had accrued to the assessee but the Board of Directors, by a resolution made subsequent to the assessment year, purported to stop payment of it, it can be said that, in the circumstances, there was no accrual of the salary to the assessee In the first place, the resolution, worded as it is, does not purport to withdraw the salary already accrued to the assessee All that it stated was : "... the company decides to stop payment of remuneration of Rs. 15,000. .... . to the managing director for the year 1959" It only means withholding of payment of remuneration and not denial or withdrawal of the remuneration for the period Even assuming that the resolution can be read as a withdrawal of the remuneration, even so we are of opinion that it would only amount to a kind of disposal by the assessee if he agreed to accept the resolution On more or less similar circumstances, this Court took that view in *Kothari Mehta & Co. (P.) Ltd* v *Commissioner of Income-tax, Madras*[1] There the managing agency commission under the terms of the agreement should be paid every year out of the profits of that year There was also a provision that the commission should become payable to the managing agents on the company's auditors certifying the company's annual balance sheet The audited accounts of the company for each year contained a statement to the effect that the managing agents had waived the commission due to them on the profits The accounts bore dates which were subsequent to the assessment years. The question arose whether if the managing agency commission had accrued to the assessee immediately upon the close of its accounting year, the waiver long subsequent to the close of the accounting year, was anything more than a disposal of the income, which had accrued to it and whether it would justify the claim that there was no accrual at all till the date of the waiver was made The question was answered against the assessee. The learned Judges there observed at page 757

> " As we have pointed out, there is no evidence of any agreement of any description which operated to alter the rate of commission or give up the commission due to the assessee No such agreement or transaction which could be regarded as an agreement was entered into during the accounting year If after the accrual of the income, according to the terms of the managing agency agreement, the managing agents purported to give up any part of that income, that cannot be regarded as affecting the terms of the agreement whereunder such income had accrued to it It follows that the view taken by the Department and the Tribunal that the income had accrued to the assessee in the instant case and that the waiver operated only as a disposal of that income is correct "

That precisely is the position in this case too As we have already mentioned, the agreement, while providing for accrual of the salary or remuneration to the assessee every month provided nowhere for waiver of any part or whole of such remuneration; nor did the agreement reserve power for the Board of Directors to decide that the assessee should forego any part of his remuneration which had accrued to him If the resolution, therefore, in this case is to be read as having the effect of denying the salary during the period of nine months to the assessee or if it is to be taken that the assessee had waived the accrued remuneration, such denial, withdrawal or waiver occurred subsequent to the assessment year, and it would, therefore, be totally ineffective in the computation of the income for the assessment year which would be liable to tax under section 7 The entries made in the folio page relating to the assessee in the books of the company, having particular regard to the terms of the agreement, would appear to be irrevocable entries and it would not be open to

1. (1963) 2 I.T J 149 . (1963) 2 M L J 248 (1963) 50 I T R. 753

the Board of Directors to cancel those entries in their effect by the resolution On this view also, the remuneration for the period of nine months can be rightly brought to tax.

The question referred to us is answered against the assessee with costs Counsel's fee Rs. 250.

V. S — *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K VEERASWAMI AND MR JUSTICE P KUNHAMED KUTTI.

V. N Krishnaswamy . *Applicant*

v.

Controller of Estate Duty, Madras *Respondent.*

Estate Duty Act, (XXXIV of 1953), *section* 10—*Applicability—Gift of house by husband to wife—Continued residence of husband in the house—Benefit of a loan secured on the security of the gifted house and utilisation of amounts by donor—Effectiveness of gift not affected—Property not deemed to pass on the death of donor*

Words and Phrases—" Property taken under any gift "—" By contract or otherwise "

The deceased purchased a site in the name of his wife, in 1929, out of his own funds and constructed a house in the next year and until his death resided in that house with his wife The income from house property was being assessed to income-tax in the hands of the deceased The property was admitted to be his in the wealth statements filed by him as on 31st March, 1942 and 31st March, 1952 Some time before his death, the deceased raised a loan from a bank by the deposit of the title deeds of the house and utilized the funds for his own purposes On his death, the accountable person, the widow, claimed that the value of the house is not liable to be included in the value of the estate of the deceased for estate duty The Assistant Controller held that there was no gift of the house and even if there was a gift, the provisions of section 10 were attracted The Central Board of Revenue in appeal held that there was a gift but the facts of residence of the donor in the gifted property and the receipt of the benefit of a loan from the bank on the security of the house attracted the applicability of section 10 of the Act On a reference to the High Court made at the instance of the accountable person,

Held that the reference has to be answered in favour of the accountable person.

Section 10 does not touch a gift which is real, complete and effective to the entire extent of its subject-matter, both in respect of possession and enjoyment and also the benefit from out of or in respect of it The word " taken " occurring in section 10 in the phrases " property taken under any gift " is of importance in the construction of the section, more especially of the effect and ambit of the two limbs, which bring to tax the value of the subject-matter of the gift as passing on the death of the deceased The two limbs cannot be understood *de hors* the disposition by gift itself, and that is implied in the word " taken "

The essential conditions for the non-applicability of section 10 are : (1) *bona fide* possession and enjoyment are assumed by the donee immediately on making the gift, (2) retention thereafter of possession and enjoyment by the donee, (3) such retention is to the entire exclusion of the donor, and (4) the entire exclusion of the donor, is also from any benefit to him out of or in respect of the subject-matter of the gift, by contract or otherwise If any of the requisites is not satisfied to that extent the property taken under the gift shall be deemed to pass on the death of the donor The essence of these requisites is total exclusion of the donor both from possession and enjoyment as well as benefit

But in the case of certain gifts, where the parties are related as husband and wife or in the case of co-tenants, if on account of the circumstances the donor has no option but to continue to reside in the house as before it cannot be said that the donor has not divested himself of possession and enjoyment Such a gift may not attract the applicability of section 10

A benefit which was not reserved by the gift but totally unconnected or dissociated or not linked up with a gift itself will not be within the purview of the second limb of the section It is also necessary for any benefit to come within the ambit of the section, that it must be by "contract or otherwise" the word " otherwise " implying some obligation in the nature of contract or quasi-contract or in some other form enforceable by the donor

Held on facts the deceased did derive a benefit by raising and utilising the loan from the bank on the security of the gifted house But it is a benefit which did not accrue to him by contract or otherwise and also the benefit was not reserved by the gift itself Section 10 is not attracted

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*T C No 195 of 1963. 7th December, 1965.

Reference under section 64 (1) of the Estate Duty Act, 1953.

M. Ranganatha Sastri and *S Bhaskaran*, for Applicant

V. Balasubramanyam, Special Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—The question referred to us under section 64 (1) of the Estate Duty Act, 1953, is :

> "Whether, on the facts and in the circumstances of the case, the house property at No 5, Avenue Road, Nungambakkam, Madras, standing in the name of Smt Parvathi Ammal was correctly included in the estate of the deceased as property deemed to pass under section 10 of the Act ?"

The site on which the house was built was purchased by P Natesan, deceased, on 18th July, 1929, in the name of his wife, Smt. Parvathi Ammal, out of his own funds By the following year, he constructed a house on the site Since then and until his death, the deceased was residing with his wife in the house The income from the property was being assessed to income-tax in the hands of the deceased The property also was admitted as his by the deceased in the wealth statements filed by him as on 31st March, 1942, and as on 31st March, 1952 Some time before his death, it is not clear from the record when this happened, a loan of Rs 35,000 was raised by the deceased from a bank on an overdraft account with it, which was secured by deposit of title deeds relating to the house. It is not in dispute that this amount was utilised by the deceased for his own purposes The accountable person, the widow of the deceased, claimed before the Revenue, though unsuccessfully, that the value of the house was not liable to be included in the principal value of the estate of the deceased liable to duty The Assistant Controller considered, in effect, that on the facts there was no gift of the house and that even assuming that there was a gift, the provisions of section 10 were applicable to the facts On appeal by the accountable person, the Central Board of Revenue stated that, in the circumstances, there can be no dispute regarding the fact that the appellant got the property as a gift from the deceased Nevertheless, the Board agreed with the Assistant Controller that section 10 was applicable This it did on two grounds The first was that the deceased was residing along with his family in the property till his death This, in the view of the Board, meant that there was no entire exclusion of the deceased pursuant to the gift from possession and enjoyment of the subject-matter The Board was aware of the relationship between the parties and the necessity of both spouses living together at the residence, but it thought that what mattered for purposes of section 10 was the factual position, namely, that as a matter of fact the deceased even after making the gift continued to live in the premises. The second ground of the Board was based on the second limb of section 10, namely, that on account of the deposit of title deeds to secure his overdraft account, and the fact that the money borrowed was utilised by him for his own purposes, he derived a benefit from the subject-matter of the gift.

To answer the question referred to us, it is necessary to have a precise appreciation of the scope and effect of section 10 It deals with gifts with reservations and, broadly speaking, contains two limbs, the first, what may be called a non-exclusion clause, and the second, retention clause From the standpoint of taxes, the section is intended to reach any gift which in reality is not so or which detracts from the nature of disposition by reason of the reservation in the subject-matter of the gift in favour of the donor, either *in specie* or otherwise, tangibly or intangibly, directly or indirectly Section 10 does not touch a gift which is real, complete and effective to the entire extent of its subject-matter, both in respect of possession and enjoyment and also the benefit from out of or in respect of it The section commences by using the words "property taken under any gift" It seems to us that the word "taken" is of importance in the construction of the section, more especially of the effect and ambit of the two limbs, which bring to tax the value of the subject-matter of a gift as passing on the death of the deceased The two limbs cannot, in our view, be understood *de hors* the disposition by gift itself, and that is implied in the word "taken". The crux of the section lies in the requisites (1) *bona fide* possession and

enjoyment are assumed by the donee immediately on making the gift, (2) thereafter retention of possession and enjoyment by the donee, (3) such retention is to the entire exclusion of the donor, and (4) the entire exclusion of the donor is also from any benefit to him out of or in respect of the subject-matter of the gift, by contract or otherwise. If any of these requisites is not satisfied, to that extent the property taken under the gift shall be deemed to pass on the death of the donor The essence of these requisites is total exclusion of the donor both from possession and enjoyment as well as benefit Whether, where there is only a partial exclusion, the entire property will nevertheless pass, we are not called upon to consider in this case.

If literal effect is given to the first requisite, there is no doubt that it is not satisfied in this case But should we construe it in such a manner as it may cover even cases of donors who, notwithstanding the gifts made by them and an intention on their part to divest themselves completely of any interest in the subject-matter of the gifts, are compelled, nevertheless, to be in possession and enjoyment of the subject-matter of the gift along with the donee, because of their peculiar relationship ? We are of the view that the section does not compel us to place such a construction on it. It only contemplates assumption by the donee of such possession, as the circumstances, would permit, and no more, and if on account of those circumstances the donor has no option but to continue in the house as before because of the relationship, it cannot, in our opinion, be said that he has not divested himself of possession and enjoyment That situation in which he continues in possession, even after the gift, along with the donee, dictated as it is by the status and personal relationship of the parties, the law cannot fail to take note of and demand a literal application of the first requisite We do not think that by section 10 the Legislature intended otherwise Such a situation is not confined to cases of relationship of the spouses where one of them makes a gift of the house, in which they reside, to the other, as illustrated by a co-tenancy, where one of the co-tenants happens to make a gift of a part of his interest in the joint tenancy and the law deems that every co-tenant is in possession of the entirety of the property for himself and on behalf of the others

On that matter, our attention has been invited to certain decided cases in England and Australia, to some of which we made reference in T C No. 171 of 1963 *Ranganatha Sastri* v *Controller of Estate Duty, Madras*[1] In one of those cases, *Attorney-General* v. *Seccomber*[2], the donor, after making a gift of certain premises in favour of his nephew, continued to live with him and it was held that it was not a colourable transfer but a real one and if the donor continued to live there, it was only by the leave and licence of the donee.

That was a case which was based upon the relationship of the parties but it illustrates that circumstances may exist in which the donor may continue to live in the premises he has made a gift of by himself or along with the donee, which fact may not detract from the completeness and genuineness of the transfer by way of gift and which may not attract the applicability of section 10 In *Controller of Estate Duty* v. *Dr Guruswami Mudaliar*[3], this Court had to consider a similar point and expressed the view .

> "The living of the deceased with his wife in the building (which was gifted to the wife) is consistent with their relationship and not because that he retained any interest in the property, namely, in the superstructure which he had absolutely gifted to his wife There are no words in the deed of gift to support any theory that he reserved any interest in the property to himself "

On that view, this Court held that section 10 was not applicable. Mr. Balasubrahmanyam contends, as he is entitled to, that this view is not based upon any reasoning We cannot take that view, for the order of this Court does state, though cryptically, the reason for it, namely, the compelling circumstance—the relationship between the spouses—which explains the fact of the husband continuing to live in the gifted premises with his wife, the donee, and which does not detract from the completeness of the gift in any sense. In *Ranganatha Sastri* v *Controller of*

1. (1966) 60 I T R 783.
2. L.R (1911) 2 K B. 688 . 1 E.D.C. 589.
3. (1964) 2 I T J. 286 : (1964) 2 M L.J. 287.

Estate Duty, Madras[1], also we were inclined to take, more or less, a similar view, though the facts in that case were different. We were, therefore, unable to accept the view of the Revenue that the first limb relating to non-exclusion from possession and enjoyment is applicable to the facts.

The applicability of the second limb is a nice question which turns on its scope. Though at first sight, it might appear that any benefit derived by the donor is within its ambit, it is manifest from a careful reading of the entire section that the scope of the second limb is not so wide as that. "Any benefit" in the section, understood in the context, is limited to a benefit either derived out of the gift or related to or associated with the transaction of the gift. It may be that, in point of time, the benefit derived and the making of the gift may not be contemporaneous. It need not necessarily be so. But a benefit totally unconnected or dissociated or not linked up with the gift itself will not be within the purview of the second limb of the section. The two limbs of the section are obviously related to property taken under any gift. It is also necessary for any benefit to come within the ambit of the section, that it must be by "contract or otherwise". This Court has taken the view in *Ranganatha Sastri* v *Controller of Estate Duty, Madras*[1]:

> "In the context 'otherwise' should be understood as implying some obligation either in the nature of a contract or a quasi-contract or in some other form. In other words, reservation of benefit to the donor should be one enforceable by him."

The Revenue here was of the view that because the loan raised by the deceased from his overdraft account secured by deposit of title deeds relating to the property was for his own purposes and was utilised by him for such purposes, it must be taken that this was a benefit derived by him from the property and that derogated from the completeness of the gift and brought it within the mischief of the second limb of section 10. We are unable to accept this view as sound. Once it is common ground that a gift was as a matter of fact made of the house, it does not appear to us that the factum of utilisation of the amount borrowed for the donor's purposes will be of any consequence in respect of the applicability of section 10. It may be conceded that, in so far as he raised a loan on the overdraft account, secured in that way, and utilised the money for his own purposes, he did derive a benefit. But it is a benefit which did not accrue to him by any "contract or otherwise" in the sense in which those were understood by this Court in *Ranganatha Sastri* v *Controller of Estate Duty, Madras*[1]. Quite apart from that, the benefit was not reserved by the gift, not that we say that the reservation should necessarily always be in that fashion. The benefit, as we think, the donor obtained was entirely collateral. It is true that even collateral benefit may, in certain circumstances, fall within the ambit of the second limb. But where the collateral benefit is unconnected or has no relation to or is not linked up with the transaction of gift itself, it will not be comprehended by the second limb. The benefit here is not incidental or referable to the gift. We have already indicated what the broad scope of the section is, namely, that it hits at gifts with reservations. If a gift is held to be complete, when it was made, and, thereafter no benefit accrued to the donor, which is linked with or referable to the gift, merely because after a real gift has been made, the donee, like any other full or absolute owner goes to the assistance of the donor, as in this case, by offering the property gifted as security for a loan raised by the donor, it cannot be held that to that extent there is a benefit accrued to the donor under section 10, which will detract from the completeness of the gift. We are of the view that the second limb of section 10 is also not applicable to the facts.

The question referred to us is answered in favour of the assessee with costs. Counsel's fee Rs. 250.

V.S. *Answered accordingly.*

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1. (1966) 60 I.T.R. 783.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K VEERASWAMI AND MR. JUSTICE P. S. KAILASAM.

T. V. Seethalakshmi Ammal .. *Applicant*

v.

Controller of Estate Duty, Madras .. *Respondent* *

Estate Duty Act (XXXIV of 1953), section 14—Applicability—Hindu undivided family—Member dying leaving widow, minor sons and daughters—Life insurance policies effected on the life of the deceased, wife being the nominee or assignee—Policies kept up with joint family funds—Money due under the policies—If joint family asset—Business as quota holder of yarn supplied by textile mill, carried on the deceased—If admits of having any goodwill—Valuation for addition to principal value of the estate of the deceased

Life insurance—Policies kept up for a donee—Kept up, means payment of premiums by the deceased assured and to keep the policy alive and from lapsing—Payment from the funds of the joint family of which the assured is member—Not kept up by the assured—Nomination and assignment under the Insurance law—Distinction—Nomination of wife—Wife not constituted a donee—Nomination specifically under the Insurance Act in favour of wife—Excludes creation of a trust under the Married Women's Property Act of 1874

Goodwill—What constitutes—Quota holding of yarn supplied by textile mills—Same kind of yarns supplied to all quota holders—Not capable of having or developing any goodwill

Insurance Act (IV of 1938), sections 38 and 39

Married Women's Property Act (III of 1874), section 6

The *karta* of a Hindu undivided family, died leaving behind him, the widow, two minor sons and three daughters There were joint family properties, thirteen life insurance policies effected in his name, out of which two were assigned in favour of the wife and the others nominated in favour of the wife in 1953 and 1955 under the Insurance Act and a business carried on by the deceased as the quota holder of yarn supplied by textile mills The principal value of the estate of the deceased for the purpose of levy of estate duty was determined as the total of one-third of the joint family assets, the entire amount due under the life insurance policies and one-third value of the goodwill attributed to the business as the quota holder In reference proceedings at the instance of the accountable person, the widow, the questions for determination, were, if the life insurance policies were the joint family assets, if the widow was a donee of the amounts due under the policies either as a nominee or assignee, if the provisions of section 6 of the Married Women's Property Act of 1874 applied to create a trust in favour of the wife and if the quota holding business can have any goodwill at all

Held that, the life insurance policies are the joint family assets and hence only a third of their value will be deemed to pass on the death of the insured The polices were not kept up with the funds of the deceased but with the funds of the joint family and therefore they would not fall within the scope of section 14 of the Act The business as a quota holder does not admit of the existence or development of any goodwill and hence no value on that account is liable to be added to the principal value of the estate of the deceased

Where the life insurance policies are taken out on the lives of the members of a Hindu undivided family and are kept up, that is to say, the premiums were paid out of the joint family funds, the amounts covered under the policies would be joint family assets on the principles applicable under the Hindu Law The presumption based on the personal contractual relationship arising under the contract of insurance and the modern concept of society and economy and individual rights may not be applicable in the determination of the character of the property

Under section 14 of the Act the amount under a policy may be deemed to pass on the death of the insured only in a case where the policy had been kept up by the deceased either wholly or partially and for the benefit of the donee, who may be a nominee or assignee

The phrase " kept up " is not a legal term or a term of art but conveys the ordinary meaning of keeping the policy alive without lapse, by payment of the premiums due in respect of it The words mean that the premiums paid should be from the own funds of the insured and not merely the physical act of payment In other words the source of premiums paid will be determinative of who kept up the policy

There should have been a gift of the money due under the policy to a person so as to constitute him a donee, either as a nominee or assignee

The word " nominee " taken by itself or even in the context of the principles that govern the law of insurance, does not involve a transfer of the rights under a policy unlike an assignment

Under section 38 (5) of the Insurance Act the effect of an assignment is that the assignee is the only person entitled to the benefits under the policy and such a person shall also be subject to all liabilities But a nomination under section 39 of the Insurance Act means that the person nominated

* T.C No 62 of 1963. 16th December, 1965.

one to whom the moneys secured by the policy shall be paid in the event of the death of the insured Unlike an assignment which is irrevocable, a nomination may, at any time, before the policy matures for payment, be cancelled or changed In the event of the policey maturing during the lifetime of the assured, the nomination will have no effect and the policy in that event, be payable to the assured

While the assignee is not merely entitled to receive but has a right to the policy money itself, a nominee is no more than a person who is competent to receive the money if the assured did not survive maturity of a policy and has no right to the money

The word " nominee " in section 14 of the Act does not appear to convey the ordinary or the statutory sense set out above In the context of the words, "for the benefit of a donee whether a nominee or assignee " it is clear that the nominee must be such as he may also be a donee That means the nominee for the purpose of section 14 of the Act must be such as will constitute the nominee, a donee entitled to the benefit of the policy money

Where the nomination was specifically mentioned that it was under the Insurance Act, such a nominee is not constituted a donee within the meaning of section 14 of the Estate Duty Act

The nomination of a widow expressed as under the Insurance Act after the commencement of the Insurance (Amendment) Act, 1946, excludes the applicability of section 6 of the Married Women's Property Act of 1874

The effect of section 6 of Act of 1874 is that a policy of insurance effected by a husband in his own name for the benefit of his wife and so expressed on the face of the policy shall enure and be deemed to be a trust for the purpose The section will not apply unless the beneficial interest which shall be deemed to be a trust, is expressly stated on the face of the policy There is no particular formula for such expression and it will be a matter of construction in each case whether there is any such expression

It is not every nomination that will have the effect of creating a trust and it is necessary to make a distinction between the creation of a trust and a simple contract between two persons for the benefit of a third Such a simple contract cannot by itself be interpreted as creating a trust The distinction may be fine but real

Broadly speaking, goodwill is the magnetic quality of a particular trade or business which attracts customers to it as a matter of course This quality springs from and is developed by various contributing factors that earn a reputation for honest dealing, quality and standard Goodwill is founded on belief and faith of the customer It is commonly built in relation to particular type of manufacture or production of articles identified by a trade mark which widely becomes known to the public and by which the customers takes it for granted that it represents what they wish for No trade mark gains a reputation overnight Naturally the standing for the business is necessarily one of the contributing factors The personalities who are engaged in the business, the location in which it is carried on and the like are other features which go into the goodwill

Where a business involves no distinguishable features and deals in standard articles manufactured by some one else which one can get from anywhere, not merely from a particular dealer, there is hardly any possibility of there being a goodwill attached to such business

On the facts the yarn supplied by the mills in question to the deceased under the quota did not in any way differ from any other supply made to other quota holders of the mills, in the matter of quality and standard manufacture The quota holding, without anything more, notwithstanding its long duration, cannot admit of the existence or development of any goodwill

Case referred to the High Court by the Central Board of Revenue, New Delhi, under section 64 (1) of the Estate Duty Act, 1953.

S. Swaminathan, for Applicant.

V. Balasubrahmanyan, Special Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J—The liability of thirteen life insurance policies to estate duty is in question in this Reference Whether there was a goodwill and if there was, whether the value, as assessed by the Department for purposes of duty, is supported by material are further questions for consideration One T K V S Vidyasagarana-chari, whose widow is the accountable person, died on 17th February, 1957 He became divided from his brother on 17th August, 1935, and the assets, that fell to his share out of the joint family properties he developed with his own efforts so that at his death, the assets belonging to the joint family consisting of himself and his two sons were valued at Rs 6,25,099 Besides his two sons, both minors, he left his wife and three daughters. The deceased's one-third share in the joint family properties was admittedly liable to duty The Assistant Controller of Estate Duty added to the principal value Rs 1,42,552 which represented moneys due under thirteen insurance policies taken out on the life of the deceased of which Rs 94,662 was after his death received by the accountable person and a sum of Rs 46,000 on policies

with the Oriental Government Security Life Assurance Company Ltd, remained to be realised if and when the company admitted the claims The balance of Rs. 4,083 related to three policies on the life of the widow, which were effected by the deceased and for which premiums were paid by him They became paid up long before the death of the deceased but the amount under the terms of the policies, was payable only on the death of the widow The deceased was one of the quota-holders for the Madurai Mills and the Meenakshi Mills and had built up a lucrative business in yarn. The Assistant Controller found that a third of the value of the goodwill of the business carried on by the family should be included in the chargeable assets and estimated its value at Rs 50,000 on the basis that the average annual profits earned in the five years immediately preceding the death of the deceased was Rs 32,579 and the value of the goodwill should be estimated as equal to 1½ years' purchase of the average annual profits The widow appealed against these inclusions and partly succeeded The Central Board of Revenue considered that the amount of Rs. 4,083 should be deleted from the principal value on the ground that the amount due under the three policies on the life of the widow was only payable on her death. The appeal failed in respect of the balance of the insurance money and the estimated value of the goodwill for duty.

The life insurance policies, the thirteen of them, were all effected on the life of the deceased between 1942 and 1955 Out of them, two were assigned in favour of his wife on 7th May, 1956, and in respect of the rest, there was only a nomination in her favour between June, 1953 and November, 1955 One of the questions raised before the Assistant Controller and the Central Board of Revenue which they decided against the accountable person, was whether on the facts and in the circumstances of the case, the thirteen policies of life insurance and the moneys payable thereunder were in law joint family properties This is the first of the eight questions referred to us under section 64 (1) of the Estate Duty Act, 1953.

It is not in dispute before us that the thirteen policies were effected by the deceased on his own life and were kept up out of the joint family assets The contention which did not find favour with the Revenue, is that because the premiums were paid by the deceased for the policies came out of the joint family funds, only a third of the total amount due thereunder should be deemed to pass on the deceased's death The Revenue authorities were of the view that the fact of such payment did not have the effect of making the policy-moneys the property of the joint family In support of this view, reliance was placed in *Venkatasubba Rao* v *Lakshminarasamma*[1]. In that case certain life insurance policies were taken in the names of members of a joint Hindu family and the premiums in respect of them were paid from and out of its funds The accounts of the joint family specified definitely the amount of the premiums as relating to the policy effected by this or that coparcener There was a separate khata in which the amounts paid towards the premiums for the several policies were separately entered The questions, the Court had to determine, was whether the amounts covered by the policies constituted joint property or separate property of the individual coparcener concerned From a commonsense point of view, the Court considered that when one of the coparceners insured his life, he intended the benefit of the policy to his heirs and not to the other coparceners Rajamannar, C J, and Venkatarama Ayyar, J, were of the view

"The presumption, therefore, would be that the profit, if any, made by means of the policy would not be joint family asset The utmost that the other coparceners in equity can claim is that the assured should be debited with the premia which has been paid from joint family funds"

Amplifying this view, they further observed:

"In our opinion, having regard to modern social conditions and the growth of individual consciousness in marked contrast to the more corporate outlook of an earlier day, the general presumption must be that when one of the members of a joint family insures his life, the amount of the policy belongs to the assured as his separate property and does not become a joint family asset The premia must be treated as amounts drawn by the individual members and they must be debited with those amounts"

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1 (1954) 1 M L J 94 I L R (1954) Mad. 26: A I R 1954 Mad 222.

With respect, we agree that a policy creates a personal contractual relationship and *prima facie* an insurance is intended for the benefit of the person taking out the policy or his family in accordance with the terms of the assurance That was also the view of the Nagpur High Court in *Manharanlal* v *Jagjivanlal*[1] That Court felt that in the absence of any proof that the policy was taken out with the intention of benefiting the family and the premia were paid out of joint family funds, the presumption ought to be that the policy was taken out as a personal policy for the benefit of the personal heirs of the assured. These principles were applied in *Karuppa Gounder* v *Palaniammal*[2]. This Court said :

" But where a coparcener has effected insurance upon his own life, though he might have received the premia from out of the funds which he might have received from the joint family, it does not follow that the joint family insured the life of the member or paid the premia in relation thereto It is undeniable that a member of a coparcenary may with the moneys which he might receive from the coparcenary effect an insurance upon his own life for the benefit of the members of his immediate family His intention to do so and to keep the property as his separate property would be manifested if he makes a nomination in favour of his wife or children as the case may be It would therefore appear that no general proposition can be advanced in the matter of the insurance policy of a member of a coparcenary and that each case must be dealt with in accordance with the circumstances surrounding it "

On the facts in that case, it was held that the insurance amount must be regarded as the separate property of the assured and by virtue of the nomination, the nominee was not entitled to any portion of the policy amount The learned Judges there noticed *Parbati Koer* v *Sarangadhar*[3], but distinguished it by observing that it only dealt with the position where it was established that the coparcenary effected the insurance on the life of a member, that is to say, paid premiums due upon the policy from out of the coparcenary funds The Revenue pressed into service the two cases decided by this Court , and equally strong reliance was placed for the accountable person on the judgment of the Supreme Court In the case before the Supreme Court, two step-brothers of a deceased, who were members of a coparcenary, sought in opposition to the widow of the deceased to have a declaration that they were entitled to the moneys due under the policies The High Court of Patna had accepted their contention and decided that the insurance policies formed part of the assets of the coparcenary to which the two step-brothers as plaintiffs were entitled as survivors On a certificate, the widow of the deceased went up before the Supreme Court. The three policies stood in the name of the deceased and had matured even during his lifetime On an examination of the relative accounts of the family, it was found that the joint family incurred expenses for purchasing the policies In other words, the premiums were paid out of joint family funds From the treatment in the common accounts and the use to which a part of the policy-moneys was put, the Supreme Court considered that those facts also showed that the policy-moneys were treated as joint family assets and not as separate property of the deceased Notwithstanding these factual findings, it was argued for the appellant before the Supreme Court that insurance was a special venture and was meant only for the benefit of the family of the assured and that the other coparceners had no interest in the policies It was also contended that by "family" was meant the wife and children of the deceased. On these contentions, it was held by the Supreme Court at page 406 .

" This might be true, but the question is not whether Ram Ran Vijaya Sinha (deceased) took out the policies for the benefit of his own family but whether he did so without detriment to the joint family funds If it was the latter, then anything obtained with the joint family funds would belong to the joint family, and this is the result, in view of our finding that it was the joint family which had paid for these policies and not Ram Ran Vijaya Sinha individually "

The attention of the Supreme Court was invited to *Venkatasubba Rao* v *Lakshminarasamma*[4], and particularly the observation which we have extracted therefrom. But with reference to this, the Supreme Court stated .

" We need not decide whether such a broad proposition should be accepted as being in consonance with the rules of Hindu Law, but unfortunately for the appellant, there are clear indications

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1 I L R (1951) Nag 937. (1952) N L J 114: A.I R 1952 Nag 73

2. (1963) 1 M.L J 86, 91 I L R (1963) Mad. 434 : A I R. 1963 Mad 245.

3 (1960) Pat L R (S C.) 27 · (1959) 29 Com. Cases 68 . A I R 1960 S C 403.

4 (1954) 1 M L J 94 . I L R. (1954) Mad. 26 : A I.R. 1954 Mad 222

that none of the three brothers intended to treat as a separate asset the income which would have accrued on the maturity or otherwise of the insurance policies "

It may be s en that as we understand the judgment of the Supreme Court the decision that the policy-moneys formed part of the assets of the coparcenary was rested on the principle that anything obtained with the joint family funds would belong to the joint family and on the test not whether the deceased had taken out the policies for the benefit of his own family but whether he did so without detriment to the joint family funds It may further be noticed that there were two other policies in that case taken at the same time on the lives of the other brothers of the deceased, the premiums for which were also paid from the funds of the press which was owned by the joint family just as in the case of three policies in the name of the deceased. In *Karuppa Gounder* v *Palaniammal*[1], as the learned Judges themselves pointed out, the premiums for the policy were paid out of moneys the assured had received from the joint family and in that sense, the Court viewed the funds for payment of the premiums as not coming from the joint family It was in that manner, the conclusion was reached that the policy there did not belong to the family but only to the assured. The presumption based on the personal contractual relationship and the modern concept of society and economy and individual rights may not help where life insurance policies are taken out on the lives of the members of a coparcenary and are kept up, that is to say, the premiums therefor were paid out of joint family funds or to the detriment of the joint family assets In such a case, the principles of Hindu Law will have application with the result that whatever is acquired out of coparcenary property or to the detriment of the joint family assets, will belong to the coparcenary or joint family It is true that upto the year 1948, the deceased was the only surviving coparcener of his branch of the family after the partition from his brother in August, 1935 and his minor sons were born subsequent to 1948 But this can make no difference to the fact that the policies were kept up by payment out of joint family funds The principle of Hindu Law as stated by Mayne in his treatise on Hindu Law and Usage (Eleventh edition) is :

" All savings made out of ancestral property, and all purchases or profits made from the income or sale of ancestral property, would form part of the ancestral or coparcenary property whether such savings or acquisitions were made before or after the birth of a son "

In our opinion, therefore, the life insurance policies are the property of the joint Hindu family consisting of the deceased and his two sons

We have next to consider the second question under reference which is :

" Whether on the facts and in the circumstances of the case, the said thirteen policies were kept up by the deceased for the benefit of a donee within the meaning of section 14 of the Estate Duty Act?"

The answer to this question will depend upon the meaning of "kept up" and the effect and scope of "for the benefit of a donee, whether nominee or assignee" in section 14 of the Estate Duty Act, 1953 The insurance policies are a species of property, the value of which will depend upon the surrender value thereof at a given time and they are dealt with separately by the section They may attract duty in accordance with the circumstances either under this section or section 6 or section 15 of the Act. For the application of section 14, the policy of life insurance must have been kept up by the deceased either wholly or partially and it was so kept up for the benefit of a donee, who may be a nominee or assignee Where it was only partially kept up by the deceased, only a proportionate policy-money shall be deemed to pass on the death of the assured. The phrase "kept up" is not a legal term or a term of art but conveys the ordinary meaning In the context of a life insurance policy, "kept up" means the policy is continued in force by payment of premiums due in respect of it In our opinion, not merely the physical act of getting a policy of insurance but all acts necessary for keeping the policy alive will be comprehended in the phrase The substantial element that goes to maintain a policy, alive, once it is taken out, is, however, payment of premiums. The words "kept up by him" indicate, to our minds that the premiums paid should be from his own funds, not merely his hand that physically

1 (1963) 1 M.L J. 86, 91 : I L.R (1963) Mad 434.

makes the remittance of the premiums. In other words, the source of premiums paid will be determinative of who kept up the policy.

Barclays Bank Limited v *Attorney-General*[1], a decision of the House of Lords; is a leading case which throws light on the expression "kept up" That decision was rendered with reference to section 11 (1) of the Customs and Inland Revenue Act, 1889 and section 2 (1) (*c*) of the English Finance Act more or less analogous to section 14 of the Indian Estate Duty Act, 1953 and the Noble Lords were agreed in holding that to keep up a policy was to pay the premiums thereon, as they fell due and the person who paid them was the person who "kept up" the policy In that case there were two policies on the life of the deceased and the question was whether they were "kept up" by him within the meaning of section 11 (1) of the Customs and Inland Revenue Act, 1889 in which case, estate duty was payable on the whole value of the proceeds What happened was, the deceased had executed a settlement for the benefit of his son and certain others including in it the policies and at the same time he transferred to the trustee of the settlement, certain income-yielding investments on the primary trust to pay the premiums from time to time to become payable in respect of the policies out of the income thereof. The deceased retained no control over the trustees and no interest under the settlement under which he was divested of all rights and beneficial interest whatsoever in the two policies of assurance The trustees were at all material times, the legal owners of the policies and they paid the premiums from the special investments The House of Lords, held, differing from the Court of Appeal, that the policies were not "kept up" by the deceased Lord Thankerton viewed the matter this way :

"I am clearly of opinion that these policies were not 'kept up' by the deceased after the date of the settlements Payment of the premium necessary for renewal was made by the appellants (trustees) over whom the settlor retained no control out of settled, funds in which the settlor had no interest, and over which he retained no control It cannot be maintained that the appellants made those payments as agents of the settlor and the fact that the funds out of which the payments were met were originally settled by the settlor is not relevant . . . ."

Lord Macmillan, while pointing out that the policies of life assurance do not by their nature fit very logically into the scheme of estate duty, which is a duty leviable on property passing on death and they have, therefore, been specially dealt with in the legislation, went on to consider the import of "kept up" The Noble Lord concurred with Lord Thankerton and the other Noble Lords who were of a similar view Lord Wright's consideration of the question was *in extenso* and we shall extract his observations as they are quite useful .

"I think that 'keeping up' a policy according to the ordinary use of language connotes payment of the premiums, which is the normal method of keeping up a policy the insertion of the words 'in proportion to the premium' paid by him is necessary to deal with the case where the deceased did not himself wholly keep up the policy but only did so partially In that case the death duty is to fall on the deceased's estate in proportion to the premiums paid by him The change in expression from 'kept up' to 'premiums paid' is necessary to give the basis of apportionment, but at the same time it identifies 'paying the premiums' with 'keeping up the policy'

The language of the sub-section supports the view that when the Act refers to keeping up the policy it means the method of paying the premiums as they fall due In the present case not only did the trustees pay the premiums as principals and not as agents for the settlor, but the money out of which they paid them was their own money in law, though in equity it was the money of the beneficiaries It was not the settlor's money The phrase 'keep up the policies' is, no doubt, an ordinary expression, but the question is whether, within the meaning of the Act, it is the settlor who has kept them up"

Lord Simons dealing with the question stated :

"I agree that it is not a term of legal art, but it is, I think, the most appropriate expression in our language to describe the doing of those acts which will prevent a policy lapsing The question is who keeps up the policy? Who does those acts which prevent the policy lapsing? Who, in fact, pays the premiums? I see no justification for ascribing those acts to a settlor who neither does them himself nor is competent to direct their performance I do not base my opinion on the juxtaposition of the words 'premiums paid by him' to the words 'kept up,' for it is by the payment of premiums that a policy is ordinarily 'kept up' My opinion would be the same if the sub-section ended with the word 'assignee'"

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1. L R (1944) A C. 372.

It is manifest from this decision and particularly the observations which we have extracted, that a person can be said to "keep up" a policy if he pays the premiums himself out of his own money and thus prevents the policy from lapsing

We have already found that the premiums to keep up the policies effected by the deceased in this case, were all paid out of joint family funds though of course the physical act of paying the premiums was perhaps that of the deceased himself. We are, therefore, of opinion that section 14 will be inapplicable to the facts of this case.

It is also inapplicable, as we consider, for another reason Keeping up a policy should be for the benefit of a donee, whether nominee or assignee That means there should have been a gift of the money due under the policies to a person so as to constitute him a donee Unless a person is a transferee of the benefit of the policies, he cannot be properly described as a donee Such a transfer can obviously be by means of an assignment But the word " nominee " taken by itself or even in the context of the principles that govern the law of insurance, admits of no doubt as to its significance A nomination does not involve a transfer of the rights under a policy unlike an assignment This distinction was recognised by a Division Bench of this Court in *Mohanavelu Mudaliar* v *The Indian Insurance and Banking Corporation Ltd* [1], in relation to sections 38 and 39 of the Insurance Act Section 38 (5) clearly states the effect of an assignment as that the assignee is the only person entitled to benefit under the policy and such a person shall also be subject to all liabilities and equities to which the assignor was subject at the date of assignment But " nomination " as seen from sub-section (1) of section 39, merely means that the person nominated is the one to whom moneys secured by the policy shall be paid in the event of the death of the assured Unlike an assignment which is irrevocable, a nomination may, at any time before the policy matures for payment, be cancelled or changed In the event of the policy maturing during the lifetime of the assured, the nomination will have no effect and the policy money will, in that event, be payable to the assured It follows that while an assignee is not merely entitled to receive but has a right to the policy-money itself, a nominee is no more than a person who is competent to receive the money if the assured did not survive maturity of a policy and has no right to the money But "nominee" in section 14 of the Estate Duty Act does not appear, as it seems to us, to convey the ordinary or the statutory sense we referred to In the context of the words " for the benefit of a donee, whether nominee or assignee " it is clear that the " nominee " must be such as he may also be a donee That means the nomination for the purpose of section 14 must be such as will constitute the nominee, a donee entitled to the benefit of the policy-money

The accountable person was but a nominee in respect of the policies except two which were of course assigned in her favour The nomination in each of these cases was no doubt *ex facie* the policy but it was specifically mentioned that the nomination was under the Insurance Act It follows that the nomination did not vest in her any right to the insurance money All that it enabled her was to receive the money and the nomination must be taken to be only for that purpose. By such nomination she by no means became a donee or a nominee within the meaning of section 14 of the Estate Duty Act Our conclusion, therefore, is that the thirteen policies were not kept up by the deceased for the benefit of a donee, whether as a nominee or assignee Because they were not so kept up by the deceased, the assignment of the two policies to the accountable person will not, in our opinion, bring even these two policies within the purview of section 14

It will be convenient to consider together Questions Nos (3) to (5) which are :

" (3) Whether on the facts and in the circumstances of the case, the moneys payable under the four policies *viz*, Policy Nos 1945037 to 1945040 which were nominated in favour of the wife of the deceased (*viz*, the applicant) on the 19th June, 1955, fall within section 6 of the Married Women's Property Act, 1874 ?

(4) If the answer to Question No (3) is in the affirmative, whether the amount payable under the said four policies cannot be deemed to pass on the death of the deceased under section 14 of the Estate Duty Act ?

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1. (1956) 2 M L.J. 476 . I.L R. (1957) Mad 326 : A I.R. 1957 Mad. 115.

(5) If the answer to Question No (4) is in the affirmative whether the amount so deemed to pass can be aggregated with the other property passing on the death of the deceased having regard to the provisions of section 34 of the Estate Duty Act ?"

The policies mentioned in the first question were effected on 10th June, 1955 and the risk commenced from that date The nomination in favour of the accountable person in respect of these policies was also on the same date There were seven other policies too in which the accountable person was the nominee and four of them are those covered by Question No (6) which we shall deal with separately It is not clear why Question No (3) was limited to the four policies alone mentioned therein as what applies to them will apply to the other policies as well in which there was nomination of the accountable person

The Revenue authorities were of opinion that section 6 of the Married Women's Property Act, 1874, will have no application to the policies covered by Question No (3) We think they were right The effect of section 6 is that a policy of insurance effected by a husband in his own name for the benefit of his wife or of his wife and children or any of them and so expressed on the face of the policy shall enure and be deemed to be a trust for the purpose Consequently as the latter part of the section states, the policy, so long as the trust lasts, will cease to be the property of the husband Section 6 will not apply unless the beneficial interest which shall be deemed to be a trust, is expressly stated on the face of the policy There is no particular formula for such expression and it will be a matter of construction in each case whether there is any such expression In *Krishanan Chettiar* v *Velayee Ammal*[1], a Full Bench of this Court resolved a conflict of opinion and held that "expressed on the face of it" in section 6 of the Married Women's Property Act did not necessarily mean that the intention of the assured should always appear on the policy itself and that the requirement was satisfied if the proposal, which, by the terms of the policy would form part of it, was expressive of such intention Against clause 12 in the proposal in that case, relating to the name of the person nominated to receive the sum assured, was mentioned "self or wife Velayammal" The learned Judges were of the view that the words created a trust in favour of the wife. Subsequently, a Division Bench of this Court in *Mohanavelu Mudaliar* v *The Indian Insurance and Banking Corporation Ltd*[2], while noticing that dispositions of life insurance policies can be classed as (1) assignment, (2) nomination and (3) creation of a trust by reason of the provisions of the Married Women's Property Act, 1882, observed

"If, by nomination, a trust is created, then the nominee becomes the beneficiary, but the difficulty is to find out from the exact words used, what the intention was, because the terms 'nomination' and 'nominee' are not strictly speaking terms of art 'Nominate' means only to name and it is in every instance a question of mixed law and fact as to what the intention is Thus by the expressions used it has to be found out whether the nomination merely creates a payee or a beneficiary for whose protection a trust is thereby created If the construction placed upon the declaration is that a trust has been created under the provisions of the Married Women's Property Act, the beneficiary would take the assured amount free of all the liabilities of the insured and if it is construed as a mere nomination, the nominee would have no more right than to receive the amount subject to all the liabilities as if the disposition was by means of a testamentary instrument"

In our opinion, if we may say so with respect, these observations represent the correct position in law We may add that it is not every nomination that will have the effect of creating a trust and it is necessary to make a distinction, as has been made in Macgillivrays' Insurance Law, between the creation of a trust and a simple contract between two persons for the benefit of a third Such a simple contract cannot by itself be interpreted as creating a trust Though the dividing line between the two classes of cases is thin, it is nevertheless real

But it is not necessary for us to consider the question very elaborately because there is a short answer to it As we already pointed out, the nomination, through *ex facie* the policies, was specifically mentioned to have been made under the Insurance Act Sub-section (7) of section 39 of the Insurance Act says

"(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies or has at any time applied

1 (1938) 2 M L J 22 I L R (1933) Mad 909 ; A.I.R 1938 Mad. 604 (F B)

2 (1956) 2 M L J 476 I L R (1957) Mad. 326. A.I.R 1957 Mad 115.

Provided that where a nomination made whether before or after the commencement of the Insurance (Amendment) Act, 1946, in favour of the wife of the person who has insured his life or of his wife and children or any of them is expressed, whether or not on the face of the policy, as being made under this section, the said section 6 shall be deemed not to apply or not to have applied to the policy "

We are of the view that the proviso applies to the nomination here and that will eliminate applicability of section 6 of the Married Women's Property Act The four policies covered by Question No (3) will not, therefore, fall within the ambit of section 6 of the last mentioned Act On this view, Questions Nos (4) and (5) do not arise for consideration.

Question No. (6) reads as follows:

" Whether on the facts and in the circumstances of the case, the policy monies received under Policy Nos 813825, 813826, 1145972 and 1145973 which were nominated by the deceased in favour of his wife on the 25th June, 1953 i e, more than two years prior to his death are not liable to estate duty on his death ?"

The Board of Revenue dealt with it from the standpoint of section 14 of the Estate Duty Act and said that the period that elapsed between the date of nomination or assignment and the date of death was irrelevant for purposes of liability under section 14. But we have already held that section 14 has no application to the policies In the order of the Assistant Controller the point was dealt with with reference to section 9 on the assumption that the policies covered by the question were all assigned to the accountable person which is not factually correct As mentioned by us, she was only a nominee in respect of these policies Though two of the policies were assigned, they are not covered by Question No (6) On the footing that the policies in question were assigned, the view was expressed by the Assistant Controller that in counting the two years' period under section 9, the date of assignment was not the criterion but who paid the renewal premiums after the assignment was relevant, and as the premiums were paid out of joint family funds after the assignment, the moneys received under the policies should be considered as property deemed to pass under section 14 of the Estate Duty Act There was here a mixing up of ideas under sections 9 and 14 The Board does not appear to have approached the four policies under section 9 but it said with reference to them that the period that elapsed between the date of nomination or assignment and the date of death was irrelevant for purposes of liability under section 14 This is on the view that section 14 applied to them which as we said is incorrect Section 9 also will not apply because there was no gift of these four policies in favour of the acountable person.

We pass on to the last two Questions Nos. (7) and (8) which relate to goodwill and its value. The questions read

" (7) Whether, on the facts and in the circumstances of the case, there is no material to support the finding that the yarn business belonging to the joint family of which the deceased was the karta, had any goodwill ?

(8) Whether, on the facts and in the circumstances of the case, there is no material to support the finding that the value of the goodwill of the business is Rs 50,000 ?"

The Assistant Controller negatived the contention that the business of the deceased in yarn was built up by his tact and personal influence and it did not survive his death. He found that the deceased was one of the quota holders for Madurai Mills and the Meenakshi Mills for supply of yarn, that the business of yarn was lucrative as found from the average profits for the five years immediately preceding the death, and expressed the view that having regard to the longstanding nature of the business and in view of the fact that the deceased was one of the quota holders for Madurai Mills and Meenakshi Mills, it could not be accepted that the business had no goodwill at the time of the death On the basis of the average annual profits for the preceding five years, namely, Rs 32,579, he estimated the value of goodwill as equal to 1½ years' purchase of the average annual profits The value of goodwill was thus estimated and fixed at Rs. 50,000, one-third of which was added to the principal value as liable to estate duty The Board agreed with the Assistant Controller as regards this and dealt with the further contention for the accountable person that goodwill, even if it existed, was not a partible item and held that the liability to estate duty was not based

on the partibility or otherwise of the property This is upon the view that the goodwill of the business, as such, was not treated as a separate asset in which the deceased had a share but it was only an element which made up the total value of the business and that the business carried on by the family was saleable As to the value of the goodwill, the Board thought that what price it would fetch over and above the tangible assets that the family possessed would be the test and the estimate made by the Assistant Controller was not extravagant.

In our opinion, the findings of the Revenue authorities on the two questions have no basis and cannot be accepted as sound in law There was here no material on which they could reasonably conclude that a goodwill existed What is a goodwill? It is one of those terms which is better understood than comprehensively and clearly described Broadly speaking, it is the magnetic quality of a particular trade or business which attracts customers to it as a matter of course This quality springs from and is developed by various contributing factors that earn a reputation for honest dealing, quality and standard Goodwill is founded on the belief and faith of the customer It is commonly built up in relation to a particular type of manufacture or production of articles identified by a trade mark which becomes widely known to the public and by which the customers take it for granted that it represents what they wish for No trade-mark gains reputation overnight Naturally the standing of the business is necessarily one of the contributing factors The personalities, who are engaged in the business, the location in which it is carried on and the like are other features which go into the goodwill Where a business involves no distinguishable features and deals in standard articles manufactured by some one else which one can get from anywhere, not merely from a particular dealer, there is hardly any possibility of there being a goodwill attached to such business

Hamilton, J in *Attorney-General* v *Boden*[1], thought that the question whether there was a goodwill or not was a pure matter of fact We are of the view that it is really a mixed question of law and fact, for, the propriety or reasonableness of an inference from proved facts is also a matter for the law, so too the question whether the factual finding is based on no material The learned Judge was there concerned with the question whether the business of lace manufacturers carried with it a goodwill The approach of the learned Judge to the question is instructive (page 559) :

"Plain net is a fabric principally used by lace manufacturers as the foundation for other work It is graded by the width of the machines and by the size of the spaces in the net work The finished product of one manufacturer is so like that of another that it is impossible to distinguish between them . that Boden & Co , never advertise They canvass a small market now principally at Nottingham since German manufacturers have learnt to supply their own markets They have no trade mark, sign, badge, or patent , any patents for machinery that there may be have been treated as of no account One machine is practically as good as another, and the product is so uniform that any one who can buy the machinery can produce the fabric Its sale depends almost entirely on the price "

The learned Judge concluded, therefore, that the business had no goodwill worth the name *S C Cambatta & Co (P.) Ltd* v. *Commissioner of Excess Profits Tax, Bombay*[2], was concerned with a business of running a theatre and a restaurant and the question there was whether a question of law did arise and whether the goodwill of the threatre and the restaurant was calculated in accordance with the law In that connection, the Supreme Court considered what a goodwill was and referred to the following observations of Lord Macnaghten in *Inland Revenue Commissioners* v *Muller & Co's Margarine, Ltd*[3] :

" What is goodwill? It is the benefit and advantage of the good name, reputation, and connection of a business It is the attractive force which brings in custom "

Reference was also made to certain other English cases and it was observed by the Supreme Court at page 505

" It will thus be seen that the goodwill of a business depends upon a variety of circumstances or a combination of them The location, the service, the standing of the business, the honesty

1 L.R (1912) 1 K B 539 (1961) 2 S C R 805 A I R 1961 S C 1010,
2. (1961) 41 I.T R 500, 504 (1961) 2 S C J 265, 3. L.R. (1901) A.C. 217.

of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill, though locality always plays a considerable part Shift the locality, and the goodwill may be lost At the same time, locality is not everything The power to attract custom depends on one or more of the other factors as well In the case of a theatre or restaurant, what is catered, how the service is run and what the competiton is, contribute also to the goodwill "

In this background of what generally is meant and understood by goodwill, we are of opinion that it cannot reasonably be found that the business of the joint family based on the manufactured yarn supplied by the mills against quota had any goodwill as such Go to any quota-holder of such yarn, you will get the same or similar yarn without any difference or distinction in quality or other characteristics. A particular yarn with reference to which the family held a quota is identified not by the trade mark assigned to it by the family but by its original manufacturer The yarn supplied by Madurai Mills and Meenakshi Mills to quota-holders is just the same and one quota-holder does not in any way differ from any other quota-holder of the mills in the matter of the quality and standard of manufacture of yarn supplied against the quotas In that sense, the long standing of the family business will have no significance in the context of whether there was a goodwill or not attached to the business. We think that the facts in this case provide no basis, and quota-holding, without anything more, cannot, in the nature of things admit of the existence or development of any goodwill On this view, it is unnecessary to consider whether the value of the goodwill has been properly determined or not is supported by material

We answer the questions referred to us in favour of the accountable person with costs Counsel's fees Rs 250

V S ——— *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE K SRINIVASAN AND MR. JUSTICE T. VENKATADRI.

T. L. Jagannatha Iyer .. *Petitioner**

v

Jeevan *alias* Bapoo and another .. *Respondents.*

Constitution of India (1950), *Article* 133 (1)—*Order of remand by High Court—Appeal to Supreme Court against under Article* 133 (1)—*Competency*

Where in an appeal arising out a petition to set aside a sale, effected in execution of a decree on the ground of material irregularities in the conduct of sale, the High Court holding that there was a material irregularity in the conduct of sale remanded the matter for enquiry and fresh disposal to the lower Court ,

Held, an appeal under Article 133 (1) to Supreme Court against the order of remand on the ground that the High Court erred in law in holding that there was a material irregularity in the conduct of sale, would be incompetent as the order made by the High Court was not a final order finally disposing of the rights of the parties before it, and hence a certificate under Article 133 (1) could not be granted

Petition under Article 133 (1) (*a*) and (*c*) of the Constitution, praying that in the circumstances stated therein and in the Memo of grounds filed to the Supreme Court, the High Court will be pleased to grant leave to the petitioner herein to appeal to the Supreme Court of India against the order of the High Court dated 1st April, 1964 in A A O No 280 of 1962

P Anantakrishnan Nair, for Petitioner

S Kothandarama Nayanar, for Respondents

The Court made the following

ORDER —This petition for leave to appeal to the Supreme Court has been filed by the decree-holder in O S No 84 of 1956 on the file of the Subordinate Judge of Madurai, a suit instituted by him against the respondents one of whom was a minor at the time of the passing of the decree In pursuance of the decree, he brought the suit property for sale in E P No 31 of 1960 and himself purchased it for Rs 13,000 The first respondent in this petition who was a minor at the time

* S.C P No 168 of 1964 in A A O No 280 of 1962. 27th April, 1966.

of the proceedings sought to set aside the sale on the ground that though he had become a major by 26th June, 1961 no notice was taken to him and also on the ground that several material irregularities had crept into the conduct of the sale on account of the fraud of the decree-holder which resulted in heavy loss to the minor in that the valuable property worth Rs 60,000 was sold for Rs 13,000. When this application out of which these proceedings arise, came before the learned Subordinate Judge, he declined to set aside the sale, as he was of opinion that the absence of notice of sale to the quondam minor would not render the sale illegal. He also found that the other objection namely that the intending bidders were prevented at the auction was not substantiated The application of the judgment-debtor was therefore dismissed Thereupon, the first respondent in the petition filed C M A No 280 of 1962 which came up for final disposal before a Division Bench to which one of us was a party This Court then observed that the absence of notice of the sale to the appellant therein was certainly a material irregularity, that the question was whether by reason of that irregularity, substantial loss had been occasioned to the judgment-debtor and that there was no proper finding on that question by the learned Subordinate Judge The petition to set aside the sale was therefore remitted back to Subordinate Judge for fresh enquiry and disposal Now it is against that order, the decree-holder has filed the present petition for grant of leave to appeal to the Supreme Court

Learned Counsel for the petitioner has contended that the value of the property would be more than Rs 20,000 and that the proposed appeal to the Supreme Court involves a substantial question of law.

In the counter-affidavit filed on behalf of the respondents, it is submitted that the petition is not maintainable, as the order to be appealed against is not a final order and that the rights of the parties have not been finally disposed of by the order of remand

The only question for consideration, therefore, is whether the petitioner is entitled to a certificate for appeal to the Supreme Court, at this stage As already stated, the petition to set aside the sale has been remanded to the lower Court, for the purpose of finding out whether the property was sold for a low price, and whether by reason of that irregularity substantial loss has been occasioned to the judgment-debtor The learned Subordinate Judge will have to hold an enquiry and dispose of the matter. Learned Counsel for the petitioner would contend that the observations of the learned Judges of this Court that the absence of notice of sale to the judgment-debtor was a material irregularity are final and that he would not have an opportunity to canvass that point According to learned Counsel the substantial question of law that he would like to canvass before the Supreme Court would be that execution proceedings taken against a person who was a minor through his guardian would be valid, even though notice had not been sent directly to the minor after attaining majority, provided notice in the execution proceedings was served properly on the guardian

We are not convinced with this argument, because we are of the opinion that the observations of this Court in the appeal would not entirely dispose of the matter finally between the parties. This brings us to the question whether the order of remand passed by this Court in the appeal is a judgment or final order within the meaning of Article 133 of the Constitution of India. It is useful to refer to the observations of White, C J in *Tuljaram Row* v. *Alagappa Chettiar*[1] .

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding as far as Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment . "

1 21 M L J. 1 I L R 35 Mad 1 at 7 (F B)

In *Jathanand & Sons* v *State of U P* [1], the High Court at Allahabad merely remanded the cases for retrial holding that there was no proper trial of the petitions. Their Lordships of the Supreme Court held that such an order remanding the cases for retrial was not a final order within the meaning of Article 133 (1) (c) and that if, after the order, the civil proceeding still remained to be tried and the rights and disputes between the parties had to be determined, the order was not a final order within the meaning of Article 133 In *Southern Railways* v *Veeraswami Nadar* [2], Ramachandra Iyer, C J, observed that the proper test to ascertain whether a judicial order was a 'judgment' was to see whether in regard to matters in controversy in the Court which rendered the judgment, there had been a completeness of adjudication

On a review of the case-law on the subject, it seems to us that the order passed in the Civil Miscellaneous Appeal is not a final order, since the matter has not been finally disposed of between the parties and the matter has been remitted to the Court below only for finding out whether the property was sold for an inadequate price on account of the material irregularities which crept in the course of the execution proceedings The petitioner is not, therefore, entitled to a certificate.

The petition is accordingly dismissed There will be no order as to costs

V K ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT —MR JUSTICE P. S KAILASAM

P Amalanathan .. *Petitioner**

v

The Superintendent of Police, Salem .. *Respondent*

Madras Police Subordinate Services Discipline and Appeal Rules (1955) (*as amended by G O Ms No*. 3075, *dated 26th September*, (1963), *rule* 3 (*c*) (4)—*Validity*

Constitution of India (1950), *Article* 309, *Proviso—Rule-making power conferred under—Nature, scope and extent*

Rule 3 (*c*) (4) of the Madras Police Subordinate Services Discipline and Appeal Rules (1955) as amended by G O Ms No 3075, dated 26th September, 1963, in exercise of the power conferred by section 10 of the Madras District Police Act (Central Act XXIV of 1859) and section 11 of the Madras City Police Act (III of 1888) read with the proviso to Article 309 of the Constitution of India, is within the competence of the rule-making powers of the Governor and hence valid

Khemchand v *Union of India*, (1963) 2 S C J 312, relied on.

The amended rule cannot be struck down on the ground that it is given retrospective effect. The rule-making power of the President and the Governor under the proviso to Article 309 of the Constitution is not in the nature of a subordinate legislation The power is conferred by the Constitution and subject to the other provisions of the Constitution the rule-making power is supreme and is not restricted There is therefore nothing in the proviso to bar making rules giving retrospective effect Nor is the rule-making power under the proviso to Article 309 confined only to regulating the recruitment and the conditions of service of persons appointed after the rule took effect There is no justification for restricting the words "persons appointed" in the proviso to persons already appointed before the rule comes into force Nothing prevents the Governor from making rules under the proviso with retrospective effect affecting Government servants prejudicially by rules which did not exist at the time of their employment

The contention that the rule-making power is exercisable only under section 10 of the Madras District Police Act and section 11 of the City Police Act and that the Governor is not competent to make rules under the proviso to Article 309 affecting the police service is untenable The power conferred under Article 309 includes the power to make rules and obviously to amend the rules relating to the police service also Further, there is no substance in the plea that the impugned rule is contrary to any of the provisions of the Madras District Police Act or the Madras City Police Act

However, under the amended rule 3 (*c*) (4) a member of the service can only be deemed to have been placed under suspension from the date of the original order of dismissal and not from the date of the original order of suspension

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1 (1962) 1 S C J 713 (1962) 2 M L J (S C) 5 (1962) 2 An W R (S C) 5 (1961) 3 S C R 754 A I R 1961 S C 794

2 (1964) 1 M L J 25 at 29

* W P. No. 1472 of 1966. 28th April, 1966

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Superintendent of Police, Salem, the respondent herein in D O No 1731 of 1964 dated 23rd September, 1964, and quash the same in so far as it suspends the petitioner prospectively and retrospectively

K K Venugopal and *V Manivannan*, for Petitioner.

The Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—This petition is filed for the issue of a writ of *certiorari* for quashing the order of the Superintendent of Police, Salem in D O No 1731 of 1964, dated 23rd September, 1964

The petitioner joined the Police Service of the Madras State in 1941 as Sub-Inspector of Police While he was serving in the Salem District, he was placed under suspension on 27th October, 1952, pending enquiry into certain charges against him The enquiry into the charges began on 19th December, 1952, and ended on 7th January, 1953 The petitioner was dismissed from service by an order dated 4th December, 1953, to take effect retrospectively from the date of suspension, 27th October, 1952.

The petitioner filed Writ Petition No. 1516 of 1956 in this Court for quashing the order of dismissal passed against him This Court by an order dated 11th November, 1958, issued the writ prayed for and quashed the order of dismissal. The State of Madras preferred Writ Appeal No 78 of 1959 against the judgment in Writ Petition No 1516 of 1956 The appeal was decided by a Full Bench of this Court on 30th April, 1964. The Full Bench dismissed the Writ Appeal holding that the rules of natural justice were violated. On 26th September, 1963, the State Government passed G O Ms No 3075 dated 26th September, 1963, amending the Madras Police Subordinate Services Discipline and Appeal Rules, 1955. According to the rule, when a penalty of dismissal imposed upon a member of a service is set aside by a decision of the Court and the disciplinary authority decides to hold a further enquiry against him, the member of the service shall be deemed to have been placed under suspension by the appointing authority from the date of the original order of dismissal and shall continue to remain under suspension until further orders In pursuance of this amendment the Superintendent of Police, Salem, by his order dated 23rd September, 1964, reinstated the petitioner in service and placed him under suspension pending disposal of the charges against him. The order also stated that the petitioner would be deemed to have been under suspension with effect from 27th October, 1952, the date on which he was originally kept under suspension As a result of the amendment and the order passed on the petitioner, though the petitioner was dismissed on 4th December, 1953, with effect from the date of suspension 27th October, 1952, the order of suspension was deemed to take effect from 27th October, 1952, and continue until further orders, The effect of this order is that, though the order of dismissal dated 4th December. 1953, passed with retrospective effect from 27th October, 1952, was set aside in Writ Petition No 1516 of 1956 on 11th November, 1958, and in Writ Appeal No 78 of 1959, the petitioner is deemed to be under suspension from 27th October, 1952. The petitioner, who would have been entitled to his pay from the date of dismissal on 4th December, 1953, up-to-date has been deprived by the amendment to the rules and the order of the Superintendent of Police.

The amendment as well as the order of the Superintendent of Police were challenged on several grounds It was submitted that the rule, which was promulgated on 26th September, 1963, cannot have any retrospective effect so as to apply to the judgment of the High Court quashing the order of dismissal of the petitioner. It was further contended that the rule-making authority cannot make any rule giving retrospective effect It was submitted that the rule, which is purported to have been made under section 10 of the Madras District Police Act and

section 11 of the Madras City Police Act read with proviso to Article 309 of the Constitution of India, is not within the competency of the rule-making powers of the Governor. The rule was also challenged on the ground that it is penal in its nature in that it deprived the emoluments to which the petitioner was entitled and was made without notice to the petitioner Finally, it was contended that, though the amended rule provided that the member of the service shall be deemed to have been placed under suspension from the date of the original order of dismissal, according to the order of the District Superintendent of Police, the petitioner is placed under suspension from 27th October, 1952, which is beyond the scope of the amended rule

The notification amending the Madras Police Subordinate Service Discipline and Appeal Rules, 1955 and the relevant rule may be extracted :

" In exercise of the powers conferred by section 10 of the Madras District Police Act, 1859 (Central Act XXIV of 1859), and section 11 of the Madras City Police Act, 1888 (Madras Act III of 1888) read with the proviso to Article 309 of the Constitution of India, the Governor of Madras hereby makes the following amendment to the Madras Police Subordinate Services Discipline and Appeal Rules 1955 (in Volume IV of the Madras Services Manual, 1954)

AMENDMENT

In rule 3 of the said rules, for clause (c), the following clause shall be substituted, namely —

'(c) (1) . . . ..

(i)

(ii) . .. .

(2) . . . . .

(3) . . .

(4) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a member of the service is set aside or declared or rendered void in consequence of or by a decision of a Court of law and the disciplinary authority, on a consideration of the circumstances of the case, decides to hold further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the member of the service shall be deemed to have been placed under suspension by the appointing authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders

(5) . . . . '"

The submission was that the impugned rule is penal in nature and is not provided in either the District Police Act or the City Police Act and is contrary to the provisions of these Acts, and, therefore, not within the competence of the rule-making powers of the Governor It was pleaded that the power of the Governor to make rules is in the nature of a subordinate legislation and he cannot make any provision giving retrospective effect Before considering this question it will be useful to refer to the decision of the Supreme Court in *Khem Chand* v *Union of India*[1] The validity of rule 12 (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 was challenged before the Supreme Court. The wording of rule 12 (4) is the same as in the impugned rule The officer concerned was a Sub-Inspector of Co-operative Societies, Delhi He was suspended on 1st July, 1949, and after enquiry was dismissed on 17th December, 1951. The officer filed a suit on 20th May, 1953, praying for a declaration that the order of dismissal made against him was invalid in law and that he still continued to be in service of the Government The trial Court decreed the suit on 31st May, 1954, declaring that the officer's dismissal was void and inoperative and that he continued to be in service of the State of Delhi at the date of the institution of the suit The Government of India preferred an appeal and the Subordinate Judge, Delhi, dismissed the appeal on 31st December, 1954 The Second Appeal preferred by the State was allowed by the Punjab High Court on 1st November, 1955, and the decree was set aside The officer preferred an appeal to the Supreme Court, and the Supreme Court by its judgment dated 13th December, 1957, held that the provisions of Article 311 (2) had not been fully complied with and declared that the order of

1. (1963) 2 S.C.J. 312 : A.I.R. 1963 S.C. 687.

dismissal passed by the Deputy Commissioner on 17th December, 1951, was inoperative and that the appellant was a member of the service at the date of the institution of the suit The Supreme Court also directed that the officer be paid his costs throughout After the decree of the trial Court was confirmed by the Sub-Court on 31st December, 1954, the officer filed another suit on 20th April, 1955, claiming arrears of salary and allowances The hearing of that suit was stayed on 26th December, 1955, as the appeal preferred by the officer was pending in the Supreme Court After the judgment of the Supreme Court was delivered on 13th December, 1957, the officer made an application to the trial Court on 26th December, 1957, praying that the hearing of the suit be taken up But the State made an application to the Subordinate Judge on 7th August, 1958, stating that the disciplinary authority had on a consideration of the circumstances of the case decided to hold a further enquiry against the officer and notified that the officer should be deemed to have been placed under suspension by the appointing authority from 17th December, 1951. The trial Court directed stay of the trial of the suit until the order of suspension was revoked. Against this order the officer filed a revision petition to the High Court challenging the validity of rule 12 (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957. The High Court dismissed the revision petition and against that order an appeal to the Supreme Court was preferred.

In the Supreme Court the validity of rule 12 (4) was challenged on the ground that it contravened the provisions of Articles 142, 144, 19 (1) (*f*), 31 and 14 of the Constitution It may be noted that as in the present case the impugned rule came into force before the Court finally held that the order of dismissal could not be sustained In the case before the Supreme Court the rule came into force on 28th February, 1957, while the judgment of the Supreme Court was on 13th December, 1957, whereas in the present case the rule came into force on 26th September, 1963, while the decision of the Full Bench of the High Court was rendered on 30th April, 1964. The plea of the learned Counsel for the petitioner that the writ petition was disposed of on 11th November, 1958, and as the rule took effect only on 26th September, 1963, the decision of the Supreme Court is not applicable has to be rejected, as the order in Writ Appeal was made only on 30th April, 1964, after the rule came into force Therefore the facts in this case are similar and the decision of the Supreme Court is applicable to this case. The Supreme Court negatived all the contentions raised by the learned Counsel for the officer. It held that Article 19 (1) (*f*) of the Constitution was not contravened. Though the officer had a right for arrears of pay and allowances, which constituted property, the Supreme Court held that the rule is a reasonable restriction of his right in respect of the property as it is in the interests of the general public.

Mr. Venugopal, learned Counsel for the petitioner, contended that the questions raised by him in this Writ Petition were not raised before the Supreme Court, and submitted that they may be decided. The scope of the rule making powers of the Governor under Article 309 of the Constitution may now be considered. Article 309 is as follows .

" Subject to the provisions of this Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State .

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State of such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act "

This Article confers certain powers upon the Legislature to legislate regulating the recruitment and conditions of service of persons appointed to public services. So long as the appropriate Legislature does not legislate on the matter, the President

or the Governor or such person as they may direct may make rules regulating the recruitment and the conditions of service of persons appointed to such services. Rules made by the President or the Governor pending legislation or the Acts made by the Legislature would be subject to the provisions of the Constitution. The Legislature has not passed any enactment and it is admitted that the President and the Governor are competent to make rules regulating the recruitment and the conditions of service of persons appointed to such services The rule-making power, though subject to the provisions of the Constitution, is conferred by the Constitution. There is no restriction on the legislative power of the President or the Governor to bar making rules giving retrospective effect A member of the Public Service holds office during the pleasure of the President or the Governor subject to the provisions of Article 311 of the Constitution The Legislature, the President or the Governor may make a law regulating the conditions of service including proceedings by way of disciplinary action The law thus made may regulate the scope and content of the doctrine of reasonable opportunity embodied in Article 311 of the Constitution It has also been held that the rules made under Article 309 or continued under Article 313 in relation to the conditions of service are enforceable by Court of law if they are mandatory in their nature Mr Venugopal, learned Counsel for the petitioner, contended that the very fact that the President and the Governor are empowered only to make rules, it would mean that the rules made by them are in the nature of subordinate legislation and can only have the effect of rules framed under legislative enactments It was further submitted that the power to make rules can only be exercised prospectively, unless the Legislature specifically empowered the rule-making authority to make rules with retrospective effect. He relied on a decision of this Court in Writ Petition No 823 of 1963, etc The contention of the learned Counsel will be right, if the rule making power of the President or the Governor is analogous to the powers of the rule-making authority under a legislative enactment This plea cannot be accepted, as the rule-making power of the President and the Governor under Article 309 is conferred by the Constitution, and subject to the other provisions of the Constitution the rule-making power is supreme and not restricted Therefore, the contention of the learned Counsel that the rule-making power is in the nature of a subordinate legislation or that it cannot pass any retrospective legislation cannot be accepted.

It was next contended that the rule-making power is confined only to regulating the recruitment and the conditions of service of persons appointed after the rule took effect. Reliance was placed on the words ' persons appointed " in Article 309, There is no justification for restricting the words " persons appointed " to persons already appointed before the rule comes into force Under Article 309, the power is conferred to make rules regulating the recruitment and conditions of service of persons appointed to such services and posts The restriction of the rule-making power to persons already appointed is not discernible in this rule The Governor and the Legislature are empowered to make rules to regulate the conditions of service with retrospective effect. Before the matter was taken up to the Supreme Court in *Khemchand* v *Union of India*[1], the Punjab High Court considered the validity of rule 12 (4) of the Central Civil Service (Classification, Control and Appeal) Rules, 1957 in *Khemchand* v. *Union of India*[2] The Punjab High Court held that nothing prevented the Government from making rules under Article 309 with retrospective effect affecting the Government servants prejudicially by rules which did not exist at the time of employment The same view was taken by the Calcutta High Court in *Anil Nath* v *Collector of Excise*[3], and by the Allahabad High Court in *Pirthinath* v *State of U P.*[4].

So far as the public servant in concerned, Article 310 provides that except as expressly provided by this Constitution every person holding a civil post in the Union holds office during the pleasure of the President and every person holding a civil

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1. (1963) 2 S C J 312 A I.R. 1963 S C 687.
2. I.L R. (1961) 2 Punj 62.
3. A I R 1958 Cal 407.
4. A I R. 1959 All 169.

post in the State holds office during the pleasure of the Governor of the State But a member of the public service is constitutionally protected, in that he cannot be dismissed by an authority subordinate to that by which he was appointed and that he cannot be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him Apart from the constitutional guarantees the public servant in also entitled to the enforcement of the rules that may be made under Article 309 or continued under Article 313 The provisions of law regulating the recruitment and the conditions of service are subject to the provisions of the Constitution and can be attacked on the ground that they are contrary to any of the provisions of the Constitution.

It was next contended that the rule-making power is exercisable only under section 10 of the District Police Act and section 11 of the City Police Act, and the Governor is not competent to make rules under Article 309 affecting the police service The submission was that section 243 of the Government of India Act, 1935 provided that the conditions of service of the subordinate ranks of various police forces shall be such as may be determined by or under the Acts relating to those forces respectively. Section 243 of the Government of India Act is not incorporated in the Constitution and it was sought to be argued that the laws continued under Article 313 of the Constitution cannot be altered or amended under the rule making powers conferred under Article 309 of the Constitution of India. Wherever the rules made under Article 309 are not in conformity with the rules continued under Article 313, it was submitted that the rules made under Article 309 should give way. This submission cannot be accepted, as the Constitution has empowered under Article 309, the Legislature and the President and the Governor to make laws for regulating the recruitment and the conditions of service of persons appointed to public services including police service The power conferred under Article 309 of the Constitution includes the power to make rules and obviously to amend the rules relating to the police service also Further, there is no substance in the plea that the impugned rule is contrary to any of the provisions of the Madras District Police Act or the Madras City Police Act It has been held by a Bench of this Court in *Rajagopal* v *Superintendent of Police*[1], that the Madras Police Subordinate Services Discipline and Appeal Rules, 1955 made in exercise of the powers conferred under section 10 of the Madras District Police Act, 1859, and section 11 of the Madras City Police Act, 1888 read with the proviso to Article 309 of the Constitution of India are valid Though the rules were expressed to have been framed under section 10 of the Madras District Police Act and section 11 of the Madras City Police Act read with the proviso to Article 309 of the Constitution of India, the rules were in fact framed under the powers conferred on the Governor under the proviso to Article 309 of the Constitution of India, and the exercise of power would be referable to a jurisdiction which conferred validity upon it This contention also fails

It was finally contended that, even if the amended rule is held to be valid, a member of the service can only be deemed to have been placed under suspension from the date of the original order of dismissal and not from the date of the order of suspension It was contended by the Additional Government Pleader that the words " the date of the original order of dismissal " in the rule should be construed as the date from which the order of dismissal took effect I am unable to construe the order in the manner suggested by the learned Government Pleader, for the words are explicit that the member shall be deemed to have been placed under suspension from the date of the original order of dismissal and not from the date of the order of suspension The order of the Superintendent of Police that the officer shall be deemed to be under suspension from 27th October, 1952, is not in conformity with rule 3 (*c*) (4) but according to the rule the petitioner will be deemed to be under suspension from 4th December, 1953 But it is unnecessary to pursue the matter as the petitioner was in suspension from 27th October, 1952 to 4th December, 1953. With these observations the Writ Petition is dismissed No order as to costs.

V K ——— *Petition dismissed*

1. A.I R 1965 Mad. 103

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction)

PRESENT:—MR JUSTICE K VEERASWAMI, MR JUSTICE T. VENKATADRI AND MR. JUSTICE M NATESAN

P S Subramaniam Chettiar & Sons, Dindigul .. *Appellant**

v

The Joint Commercial Tax Officer III, Dindigul .. *Respondent*

Madras General Sales Tax Act (I of 1959), section 16—Assessment of escaped turnover under—If can be made to the best of judgment—Power to assess by best judgment if implicit in section 16

Section 16 of the Madras General Sales Tax Act (I of 1959) does not include the power to assess by best judgment escaped turnover The section does not expressly provide for power to make assessment by best judgment Having regard to the scheme of the Act, particularly the provisions relating to the procedure of assessment, the language employed by section 16 in contrast with sections 12 and 13 in the background of the legislative history relating to procedural provisions for assessment of escaped turnover, it is not possible to imply a power in section 16 to assess by best judgment

Broadly speaking in the taxation laws of this country, assessment by best judgment as a distinct category of power has come into practice and whenever the Legislature thought fit, it expressly conferred that power upon the assessing authority If it was intended that the assessing authority should have the power to determine escaped turnover under section 16 by best judgment, it would have been easy for the Legislature to have expressly said so It seems therefore that when section 16 omitted the words ' determine the turnover by best judgment ' which were found in rule 17 of the Madras General Sales Tax Rules (1939), the predecessor of section 16 of the 1959 Act, the omission was deliberate

In a taxing statute, like any other statute, we are concerned with the express language used and there is hardly any room for implication of power which is not expressly given, for the same statute clearly shows that whenever a power to assess by best judgment is contemplated, it is expressly given

Srinivasappa v *State of Madras*, (1964) 2 M L J 508 15 S T C. 784, overruled, *Commissioner of Sales Tax* v *Kunte Brothers*, 13 S T C 366, dissented from *State of Andhra Pradesh* v *Ravuri Narasimloo*, (1965) 1 An W R 175 16 S T C 54, followed

Appeals under clause 15 of the Letters Patent against the order of the Honourable Mr Justice Srinivasan dated 19th February, 1965, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos 724 and 725 of 1965 presented under Article 226 of the Constitution of India to issue writs of *certiorari* calling for the records of the Joint Commercial Tax Officer III Dindigul, the respondent herein in M O S T. No. 10486/61-62 and M G S T. 10486/62-63 respectively and quash the orders dated 15th December, 1964, therein

S. Mohan Kumaramangalam for *Subbaroya Iyer, Sethuraman, Padmanabhan* and *V. Rajagopalan*, for Appellant.

Special Government Pleader, on behalf of Respondent.

When the appeal came on for hearing before a Bench, the Court made the following order delivered by

Veeraswami, J—These cases raise an important question as to the scope of section 16 of the Madras General Sales Tax Act, 1959 The question is whether the section includes power to assess by best judgment On that matter, this Court in *D Srinivasappa & Sons* v *State of Madras*[1], and the Madhya Pradesh High Court in *Commissioner of Sales Tax* v *Kunte Brothers*[2], have taken one view, and the Andhra High Court in *State of Andhra Pradesh* v *Ravuri Narasimloo*[3], a contrary view On hearing the arguments on both sides, we feel that *D Sreevinasappa* v *State of Madras*[1], may possibly require reconsideration, though we have not arrived at any firm or final conclusion We, in the circumstances, consider that it is necessary that these cases relating to that question are disposed of by a Full Bench For this purpose the papers may be placed before the learngd Chief Justice.

K Rajah Aiyar for *Subbaroya Iyer, Sethuraman, Padmanabhan* and *V Rajagopalan*, for Appellant

Special Government Pleader, on behalf of Respondent.

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* W A Nos 80 and 81 of 1965 22nd August, 1966.

1. (1964) 2 M L J 508 (1964) 15 S T C. 784.
2. (1962) 13 S T C. 366.
3. (1965) 1 An W R. 175 (1965) 16 S T.C 54.

The Judgment of the Court was delivered by

Veeraswami, J—These writ appeals are placed before us on a reference by a Division Bench of which two of us happened to be members. The question we are called upon to decide is whether section 16 of the Madras General Sales Tax Act, 1959 includes the power to assess by best judgment escaped turnover

The appellant was assessed to sales tax for the assessment years 1961-62 and 1962-63 by orders dated 5th October, 1962 and 29th August, 1963 In July, 1964 there was a surprise inspection of the residence of one K Pichaimuthu which resulted in discovery of 29 slips of which eight were alleged to refer to the appellant Some time later there was another inspection of the business premises of Messrs R Perumal and M Palaniandi Chettiar under whom K Pichimuthu was working as an Accountant, and this time 27 slips were recovered out of which 25 were said to relate to the appellant On 6th December, 1964, the Assessing Authority concerned served notices on the appellant to show cause why a certain turnover for each of the years should not be treated as having escaped assessment and the same brought to tax The appellant preferred various objections which were all overruled and by two different orders both, dated 15th December, 1964, the Assessing Authority brought to tax a turnover of Rs 26,229-92 for the assessment year 1961-62 and a turnover of Rs 41,34,821-00 for the next assessment year as having escaped assessment For the first of these years, the process by which the Assessing Authority determined the turnover by best judgment was this He referred to seven slips the turnover of which amounted to Rs 20,312 He then proceeded to fix Rs 2,901-70 as the average rate per pattial and finding that one of the pattials recovered contained the serial number 909, multiplied the average rate by that figure and thus arrived at the turnover which was supposed to have escaped assessment In the other case, the Assessing Authority took up one of the slips which showed cash and credit sales for Rs 1,064-06 and Rs 4,378-64 As per the accounts the sales recorded for 1st August, 1962, amounted to only Rs 447-84 The balance of the amount in that slips and the amounts found in the other slips were not, according to the Assessing Authority, brought into the appellant's account He, therefore, proceeded to find that if on a particular date there were suppressions to the extent of Rs 4,994-86, the turnover that might have escaped assessment in proportion to the turnover already assessed would be, so was the reasoning of the Assessing Authority, Rs 5,443/448+3,40,327 which would come to Rs 41,34,821 This the Assessing Authority fixed as turnover which should be taken to have escaped assessment for the assessment year 1962-63 The Assessing Authority further imposed penalties on the appellant. The assessee has filed regular appeals against the orders and they are said to be pending disposal Nevertheless, he also filed two writ petitions which were heard by Srinivasan, J The learned Judge summarily dismissed them on the ground that the petitioner had an alternative remedy which was all the more suitable in this case as factual matters had to be decided The writ appeals from those orders raised a question of jurisdiction and in view of a conflict of decisions on the scope of section 16 of the Madras General Sales Tax Act, 1959 and parallel provisions in like enactments in other States, the appeals were directed to be placed before us

Two learned Judges of this Court Ramakrishnan and Ramamurti, JJ, in *D Srinivasappa* v *State of Madras*[1], were of opinion that though section 16 did not expressly include the power to assess by best judgment escaped turnover, still it was implicit in the section A Division Bench of the High Court of Andhra Pradesh in *State of Andhra Pradesh* v *Ravuri Narasimloo*[2], however, expressed a different view and held that section 14 (4) of the Andhra Pradesh General Sales Tax Act, 1957 was confined to escapement of turnover which was definitely established That Court was inclined to think that the words in section 14 (4) "which has escaped assessment" would only imply turnover which was definitely proved to have escaped and did not include turnover which might have escaped assessment *Commissioner of Sales Tax* v *Kunte Brothers*[3], a decision of the Madhya Pradesh High Court was

1 (1964) 2 M L J 508 (1964) 15 S T.C. 784.

2. (1965) 1 An W.R. 175 : (1965) 16 S T C 54

3. (1962) 13 S.T.C. 366.

referred to and dissented from by the Andhra Pradesh High Court The Madhya Pradesh High Court had relied on an English case which, as the Andhra Pradesh High Court pointed out, was concerned with section 36 of the English Income Tax Act which in terms conferred power to make assessment by best judgment The question is which of the views represents the correct view

The Madras General Sales Tax Act, 1959 defines 'turnover' as the aggregate amount for which goods are bought or sold, and charged, by section 3, turnover when it exceeds the minimum limit Section 11 provides that tax under the Act shall be assessed, levied and collected in such manner as may be prescribed The next section contains the procedure to be followed by the Assessing Authority in making assessment In cases where a return is filed and it is accepted, the assessment will be on that basis. But if no return is submitted or if a return submitted is incomplete or incorrect, the Assessing Authority may, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgment While making an assessment under this section, the Assessing Authority may also direct payment of penalty subject to certain limits Section 13, which deals with provisional assessment also lays down the procedure for making such assessment which includes in cases of no return or a return which is incomplete or incorrect, the power to assess by best judgment Where an assessment is made by best judgment under section 12 the assessee may ask for cancellation under section 14 of such assessment on certain grounds within a limited period. Section 16, with which we are concerned reads.

" 16. *Assessment of escaped turnover* —(1) Where for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax or has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, subject to the provisions of sub-section (2) at any time within a period of five years from the expiry of the year to which the tax relates, assess, the tax payable on such turnover after service of notice on the dealer and after making such enquiry as it may consider necessary

(2) In making an assessment under sub-section (1), the assessing authority may, if it is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer direct the dealer to pay, in addition to the tax assessed under sub-section (1), a penalty not exceeding one and a half times the tax so assessed

Provided that no penalty under sub-section (2) shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition

(3) The powers under sub-section (1) may be exercised by the assessing authority even though the original order of assessment, if any, passed in the matter has been the subject-matter of an appeal or revision

(4) In computing the period of limitation for assessment of the escaped turnover under this section, the time during which proceedings for assessment remained stayed under the orders of a civil Court or other competent authority shall be excluded "

Sub-section (1) of the section is concerned with two kinds of escapement, (1) turnover escaping assessment and (2) turnover being assessed at a rate lower than the rate at which it is assessable In the second category of cases, there is, of course no question of best judgment, but in dealing with the first category, the question arises whether the Assessing Authority is confined to the turnover actually proved by evidence to have escaped assessment or can go beyond and determine the quantum of turnover by best judgment

The sub-section does not expressly provide for power to make assessment by best judgment But this Court in *D Sreenivasappa* v *State of Madras*[1], proceeded on the view that the power was implicit in the section, though it was aware of the contrast that section 12 expressly conferred such a power in making initial assessments In our opinion, having regard to the scheme of the Act, particularly the provisions relating to the procedure of assessment, the language employed by section 16 (1) of the Act in contrast with sections 12 and 13 in the background of the legislative history relating to procedural provisions for assessment of escaped turnover it is not with respect, possible to accept that view Broadly speaking, in the taxation laws of this country, be it income-tax or sales tax, assessment by best jugdment as a distinct category of power has come into practice and wherever the Legislature thought fit, it expressly conferred that power upon the Assessing Authority In the

1. (1964) 2 M.L.J. 508 : (1964) 15 S T C. 784.

Madras General Sales Tax Act, 1939, section 9 contained the power and the procedure for assessment and, as it originally stood assessment by best judgment was not provided for But this power, in relation to initial assessments was conferred for the first time by an amendment by Madras Act XXV of 1947 Section 9 (2) (*b*), as it stood originally, read that if no return was submitted by a dealer or if the return made was incorrect or incomplete, the assessing authority was empowered to determine the turnover in accordance with the rules made under sub-section (2) of section 3 But these words were, by the Amending Act, substituted by the words " shall assess the dealer to the best of his judgment" The power to assess escaped turnover was not to be found in the Act of 1939 itself, but section 19 (2) (*f*) provided for rule-making power in respect of assessment to tax under the Act of any turnover which had escaped assessment and the period within which such assessment might be made Pursuant to this power, the State Government made rule 17 in the General Sales Tax Rules which, as it stood at the start, did not include the power to assess escaped turnover by best judgment. It is interesting to note that clause (1) of rule 17 was more or less in the same terms as we find the present section 16 (1) in the Act of 1959 But by G O. No 2204, Revenue, dated 21st August, 1961, the rule was amended by including the words ' determine to the best of his judgment the turnover which has escaped assessment '. Tax Rule 17 as amended thus incorporated the power for the Assessing Authority to assess escaped turnover by best judgment. It is clear from those provisions in the 1939 Act and the Rules made thereunder as amended as aforesaid as well as sections 12 and 13 of the 1959 Act that whenever the State Legislature or the rule-making authority intended that the Assessing Authority should have the power to assesse by best judgment in certain circumstances it conferred the power by express words The amendments show not only the need therefor to take the particular power but also the distinction made between the ordinary powers of assessment based on actual material and an assessment by best judgment It seems to us, therefore, that when section 16 omitted the words 'determine the turnover by best judgement' which were found in Tax Rule 17, the predecessor of section 16 (1) the omission was deliberate. If it was intended that the Assessing Authority should have the power to determine such turnover by best judgment, it would have been easy for the State Legislature to have expressly said so, adopting the language of Tax Rule 17 Further, while the Legislature provided for the power specifically in section 12 and by an amendment in section 13 of the 1959 Act, there is no reason why if it intended to provide for the power in section 16, it should have omitted to use similar or other appropriate express language

It has been contended for the State thatpower to assess would include also power to assess by best judgment But in the context of the other provisions like sections 12 and 13 and the legislative history which we referred to, it is not possible to accept this contention. In a taxing statute, like any other statute, we are concerned with the express language used and there is hardly any room for implication in the section of power which is not there expressly given, for, the same statute clearly shows that whenever a power to assess by best judgment is contemplated, it is expressly given. The result of the contrast of the language of sections 12 and 13 with that of section 16 (1) and the legislative history we referred to necessarily repels any possibility of implied power in section 16 (1) to assess by best judgment

A case for best judgment arises at the initial stage of assessment either where no return is filed or where a return is filed, it is incomplete or incorrect In such a case, it will not be expected that accounts or other materials will be forthcoming on which assessment can be directly based. The Assessing Authority who is charged with the duty of assessing the quantum of turnover will have, therefore, to determine the turnover to the best of his judgment Best Judgment, however, does not mean that the Assessing Authority can base the quantum determined by him on no material at all. If there is some material either in the form of direct evidence or circumstantial evidence or in the form of facts which may lead to a reasonable inference, the Assessing Authority may well be justified in relying on the same and fixing the quantum on an estimate. While the quantum fixed by best judgment should necessarily

be based on some material at least its extent can be justified only if it is on a reasonable basis. It is, however, conceivable that in the nature of things, best judgment may involve a certain amount of guess But that does not mean that the guess can be capricious or unreasonable or totally without a basis It may be seen, therefore, that assessment by best judgment is a distinct procedure sanctioned by tax laws whenever it is intended Evidently the framers of section 16, as it stands today, intended that such a power need not be given to the Assessing Authority and that is why, as we are inclined to think the words in Tax Rule 17 under Act 1939, which, as we said, is the predecessor of section 16, namely 'determine the turnover by best judgment', have been omitted in section 16 (1)

The Andhra Pradesh High Court rested its judgment on a comparison of the provisions relating to submission of no return or incomplete or incorrect returns in relation of the procedure for assessment with the provision for assessment of escaped turnover and came to the conclusion that in view of the difference in the phraseology employed by the relative sections, it was reasonable to conclude that the power under sub-section (4) of section 14 was limited to assessment of turnover which was definitely established With respect we find ourselves in agreement with that view. We also derive support for the view from the legislative history of the sales-tax provisions in this State

We hold that section 16 (1) of the 1959 Act does not include the power to assess by best judgment. Inasmuch as the Assessing Authority proceeded in these cases on the basis that it had power to assess by best judgment, its orders are quashed. The writ appeals are allowed with costs, one set: Counsel's fees Rs. 250 The Assessing Authority will be at liberty to proceed further under section 16 in the light of this judgment.

V.K. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE K VEERASWAMI AND MR. JUSTICE M NATESAN

Amirthammal . *Petitioner**

v.

K. Marimuthu .. *Respondent*

Criminal Procedure Code (V of 1898), section 488 (1)—'Child'—If means only a person of tender years or any person irrespective of age.

The word 'child' is not defined in the Criminal Procedure Code and the question whether a 'child' for purposes of claiming maintenance under section 488 of the Criminal Procedure Code should be a person of tender years or at least a minor under the law or could he or she be of any age and claim maintenance from a person if they could establish that they were issues born to such a person, has been the subject of different views

The scope and content of the word 'child' in the section has to be viewed in the historical background and object of the legislation The object of the provision is to prevent vagrancy on the analogy of the Poor Laws and Bastardy Acts in the United Kingdom It is also clear that the word is not defined statutorily and the omission to specify the age limit, as in some other statutes like the Factories Act, Child Marriage Restraint Act, etc, seems to be deliberate The clue for the interpretation of the word is provided in the section itself by the use of the expression, "child unable to maintain itself".

The word 'child' in the context connotes apart from the relationship, an idea of infancy. The use of the neutral pronoun 'itself' signifies and emphasises the infancy of the claimant Hence the meaning of the word 'child' in section 488 of the Criminal Procedure Code must be taken to be a minor whether under the Indian Majority Act or the Court of Wards Act or the Guardian and Wards Act and it cannot include any person of whatever age, who is unable to maintain himself or herself, merely because he is a child of his father

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Additional First Class Magistrate No 1, Madurai, dated 29th August, 1964, and made in M C No. 234 of 1964

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*Crl.R.C. No 1722 of 1964 and Crl. R.P. No. 1693 of 1964. *25th March,* 1966.

R Santhanam, for Petitioner

T. S Arunachalam, for Respondent.

The Public Prosecutor, for State.

The Petition was first heard by Anantanarayanan, J , who made the following

ORDER* —This revision proceeding, which I am segregating with regard to its facts for the time being, also primarily involves a point of law, upon which there has been a marked divergence of opinion, as between the various High Courts in India The point of law may be expressed in the following form . Do the words "if any person having sufficient means neglects or refuses to maintain . . his legitimate or illegitimate child unable to maintain itself" occurring in section 488 (1), Criminal Procedure Code, imply that the word 'child' means, in that context, a person of tender years, a person of less than maturity, or (alternatively) a person who is the issue of that parent, without reference to age?

This matter, of course, has arisen for consideration upon several occasions in this Court, and has been subject of the decisions of various High Courts in India I had occasion to consider the true interpretation in *Ibrahim* v *Saidani Bi*[1], where I have referred to the judgments of (1) Panchapakesa Ayyar, J , in *Subbamma* v *Venkata Reddi*[2], (2) Lakshmana Rao, J , in *Kanniah* v *Rajammal*[3], (3) a Division Bench of the Bombay High Court in *Ranchoddas Narottamdass* v *Emperor*[4], *Hemanta Kumar Banerji* v *Manorama Debi*[5], and (5) *Purnasashi Devi* v *Nagendar Nath*[6] In my view, there expressed the word 'child' as occurring in section 488 (1), Criminal Procedure Code, can only denote a person of tender years, not yet *sui juris* Where a person is legally capable of entering into contracts and instituting suits, that person cannot any longer be considered a 'child'. I shall now refer to little more extensively to the conflict of the case-law on this aspect, in order to elucidate the reference that I am making in this matter

In *Krishnaswamy Iyer* v. *Chandravadana*[7], Sankaran Nair, J , took the view that I have adumbrated above. The learned Judge pointed out that the word 'child' had not been defined in the Criminal Procedue Code, and that in United Kingdom, it has various statutory definitions Panchapakesa Ayyar, J., in *Subbamma* v. *Venkata Reddy*[2], affirmed this view and acutely emphasised what could be the logical consequence of a contrary view In *Kanniah* v. *Rajammal*[3], Lakshmana Rao, J., expressed a different view But this is a very brief decision, and the facts were not fully furnished *Ranchhoddas Narottamdass* v. *Emperor*[4], and *Hemanta Kumar Banerji* v. *Manorama Debi*[5], take the view that I have expressed

But it must be equally conceded that many High Courts in India have taken a contrary view They include the Calcutta, Bombay, Mysore, Nagpur and Kerala High Courts, and since it is not further necessary to analyse the case-law here, I am merely indicating the references herewith ; *Purnasashi Devi* v. *Nagendra Nath*[6], *W L Faria* v *Anita Menene Faria*[8], *Ahmed Mahomed* v *Bai Fatma*[9], *Ismail Sheriff* v. *Nasarin*[10], *State* v. *Ishwarlal*[11], and *Saraswathi* v. *Madhavan*[12]

Before making the present reference, I attempted to delve into the etymological roots of the words in the absence of any statutory definition in the Criminal Procedure Code But I must confess that the attempt has not been very successful The reason is that the word 'child' has been given a statutory definition in several enactments in the United Kingdom pointed out by Sankaran Nair, J , in *Krishnaswami Iyer* v *Chandravadana*[7]. Etymologically speaking, the word has two different senses, one of which is that of an infant, or a person of tender years, or one who has not

* 24th September, 1965.
1 (1964) 2 M L J 70 (1964) M L J (Crl) 402
2 (1950) 1 M L J 158.
3 (1941) 2 M L J 75 A I R 1941 Mad 684.
4 A I R 1949 Bom 36
5. A.I.R. 1935 Cal. 488.
6 A I R 1950 Cal 465
7 (1913) 20 I C 1005.
8 A I R 1951 Cal 66
9 A I R 1943 Bom 48.
10. (1965) M L J (Crl) 83.
11 A I R 1950 Nag 231.
12 A.I.R. 1961 Ker. 297.

attained maturity of either sex. But an equally permissible meaning derived from a root of the word, is that it indicates the issue of the parent or parents concerned The relevant preference will be found in the Shorter Oxford English Dictionary and in Burrows Words and Phrases, Volume I, page 428, and also in Corpus Juris Secundum, Volume 14, 1109 In the last authoritative work, the following passage, which is of great interest, occurs

"The term has a second well understood meaning, irrespective of parentage, and imports minority, infancy or the early years of life In laws for the protection of children, the term 'child' means generally the young under the age of puberty and in this age sense the word has been defined as meaning an infant, a young person, a youth or one of tender years . one not old enough to dispense with maternal aid and care"

I do not think that it is necessary or desirable in the present context, that I should further set forth the reasoning upon which I have expressed my own view in the earlier citation But it may be pertinent to add that the expression "unable to maintain itself" occurring in section 488 (1), Criminal Procedure Code, may also be significant with regard to the neuter gender of the pronoun 'itself' If the Legislature had intended that the word 'child' applies strictly to issue without any reference to age, it would have been natural to expect that words like 'himself or herself' would have been used. The matter is likely to frequently recur in our Courts, and, so far, there has been no authoritative Bench decision of this Court on this point Consequently, I direct that the papers may be paced before my Lord the Chief Justice so that the revision proceeding may be referred to a Bench

In pursuance of the said order, the petition was then heard by a Bench (Veeraswami and Natesan, JJ)

R Santhanam, for Petitioner.

T. S. Arunachalam, for Respondent.

The Public Prosecutor, for State.

The Order of the Court was made by

Natesan, J —This revision case arising out of a proceeding before the Additional First Class Magistrate, Madurai, under section 488 (1)l Criminal Procedure Code, comes before us, as the matter has been referred to a Bench in view of the conflict of case-law and marked divergence of opinion between various High Courts and even in decisions of the same High Court on the question whether the word 'child' in section 488 (1), Criminal Procedure Code, in the context means a person of tender years or a person who has not attained the age of majority, that is, person under non-age or expresses only the relationship of a person as the immediate issue of a parent, without reference to age

The application which has given rise to the proceeding was filed by one Amirthammal, the petitioner herein, of Melaponnagaram, Madurai, against her son Marimuthu claiming maintenance for two children of Marimuthu, a son named Balakrishnan and a daughter Ramanujam, both of whom are living with her It is seen from the order of the Court below that the girl Ramanujam has a twin sister Sitalakshmi who has been married away In the petition it is alleged that the boy Balakrishnan was aged 17, sickly and was not keeping good health and Ramanujam was just 15 years old The mother of these children died in 1947, and it is found that their father Marimuthu had married again in about 1959, and sometime after that he had neglected these children The learned Additional First Class Magistrate No. 1, Madurai before whom the matter came up, finds that there is sufficient evidence on the side of the respondent which was not seriously shaken in cross-examination to show that the boy Balakrishnan was capable of doing some work and that he was doing work and earning Rs 2 to Rs 3 per day It is found further that he was born on 23rd May, 1944 and had completed 20 years of age on the date of the application under section 488 (1), Criminal Procedure Code As regards the girl Ramanujam, the learned Magistrate is of the view that she was in all probability aged 18 In these circumstances, purporting to follow the latest decision of this Court in *Ibrahim* v *Saidani Bi*[1], the learned Magistrate held that neither of the children was entitled to claim maintenance from their father.

1. (1964) 2 M.L.J. 70. (1964) M.L.J. (Crl) 402.

The relevant portion of section 488 (1) runs as follows —

"If any person having sufficient means neglects or refuses to maintain his legitimate or illegitimate child unable to maintain itself, . a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of such child "

The word 'child' is not defined in the Code of Criminal Procedure and the cleavage of judicial opinion is on the question whether the word 'child' is a person of tender years who has not attained majority While in some decisions the view has been taken that the word 'child' used in sub-clause (1) of section 488 means a boy or girl below 18 years of age, some decisions take the view that there is no justification whatsoever to hold that the word 'child' used in the sub-clause has any reference to the age of the boy or girl and that just indicates only that the claimant for maintenance should be the offspring of the person from whom maintenance is claimed.

The earliest case of our Court where a limitation has been placed upon the age, is the decision of Sankaran Nair, J, in *Krishnaswamy Iyer* v *Chandravadana*[1] The matter came up to this Court on the application by the putative father of an illegitimate girl for alteration of the allowance on the ground that the girl was more than 16 years old and could no longer be regarded as a child unable to maintain herself. The learned Judge observed .

"The word 'child' has not been defined in the Criminal Procedure Code In England it has got apparently various statutory definitions But in the absence of any definition or anything to the contrary in the Act, I am of opinion that a 'child' is a person who has not reached full age It is only then that she becomes competent to enter into any contract or enforce her claims as this daughter has not attained the age of majority, *i e*, 18, I think she is a 'child' within the section ".

In *Subbamma* v *Venkata Reddi*[2] while awarding maintenance to a son till he completed 18 years, Panchapakesa Ayyar, J, observed.

"I consider that a 'child' entitled to maintenance under section 488, Criminal Procedure Code, must be a minor that is, normally below 18 years, though, if he is a ward under the Court of Wards or a person for whom a guardian has been appointed by Court, the age may perhaps be advanced to 21 I am unable to agree with the contention of the learned Counsel for the petitioner that a 'child' for the purpose of section 488, Criminal Procedure Code, may be of any age, and need only be unable to maintain itself The petitioner's Counsel urged that 'child' in section 488, Criminal Procedure Code, means only 'progeny'. If that were so, a man of 77, unable, owing to senility to, maintain himself, can sue his father aged 97 for maintenance as his 'child' This is manifestly absurd Though a child may mean "a child in the womb" as well as this old man of 77, and a person below 14, for the purposes of Children's Act etc, the meaning of the word in section 488, which contains no definition of it, must be taken to be a 'minor' whether under the Indian Majority Act, or the Court of Wards Act or the Guardian and Wards Act".

The next decision of this Court where limitation was placed on age is the decision followed by the Court below *Ibrahim* v *Saidani*[3] Anantanarayanan, J, (as he then was) follows *Subbamma* v *Venkata Reddi*[2], as one that has considered the matter in all its relevant aspects as far as this Court was concerned The learned Judge concludes the discussion with the following observations .

"The logic appears to me to be irrefutable that where a person is legally capable of entering into contracts and instituting suits, that person cannot any longer be considered a 'child', though a person who has not attained that status might be a 'child' for the purpose of section 488 (1), Criminal Procedure Code, even if that person is of such an age as to be ordinarily termed a 'boy' or 'girl' and not a 'child' I leave open the question whether a person who may be theoretically above 18, but still not merely incapable of taking care of himself or herself, but also not *sui juris* because of any defect, such as mental infirmity, etc. would or would not be a 'child' for the purpose of section 488, Criminal Procedure Code"

The question now in issue is left open

The decision in *Krishnaswami Iyer* v *Chandravadana*[1], has been followed by several of the High Courts In *Gangaramsa* v *Vishnusa*[4], a boy over 18 years was refused maintenance by the Nagpur Judicial Commissioner's Court following the above decision In *Bran Shanta* v *Ma Chan Tha May*[5], the claim or maintenance was on-

1 25 M L J. 349 I L R. 37 Mad 565 at 566
2 (1950) 1 M L J 158 A.I R. 1950 Mad. 394.
3 (1964) 2 M L J 70 at 72 · (1964) M L J. (Crl.) 402
4 65 I C 31
5. I L R 2 Rang 682.

behalf of a boy aged 11 and there was some evidence that the boy had occasionally been employed to tend cattle On the question whether the boy could be considered to be a child, the learned single Judge followed the decision of this Court in *Krishnaswami Iyer* v *Chandravadana*[1], and observed that the father who had sufficient means was bound to maintain his child who was under the age of majority In *Shanno Devi* v. *Daya Ram*[2], where the question was whether the boy aged about 16 years was a child, it was observed

"The boy is admittedly below 18 and he could be considered a child so long as he is not able to maintain himself"

In *Hemanta Kumar* v *Monorama Debi*[3], where the boy was aged 17, the claim to maintenance was upheld observing, 'under the Majority Act, a person who has not attained the age of majority, that is, 18, is incompetent to contract and is therefore a child within the meaning of the section'. A Division Bench of the Bombay High Court in *Ranchhoddas Narottamdas* v *Emperor*[4], also adopts the view of the Calcutta High Court in *Hemanta Kumar* v *Monorama Debi*[3] In *Saraswathi* v *Madhavan*[5], the claimant for maintenance was a daughter aged 22 After pointing out that the decisions in question are not uniform, the learned single Judge observed that he was in respectful agreement with the view taken by this Court in the decisions referred to above and that if the intention of the Legislature in using the word 'child' was different, they could have used the word 'son' or 'daughter'.

But there is another line of decisions in this Court indicating a different view. In *Parrappath Chinna* v *Sankunni Menon*[6], (Ayling and Napier, JJ), Napier, J, observed .

"The section (section 488, Criminal Procedure Code) is certainly old as it is to be found in the Act of 1861. But we have to bear in mind its origin In so far as illegitimate children are concerned it owes its origin to the old English Act VII and VIII Vic Ch 101 which gave a right to a woman either before or after the birth of her illegitimate child to apply for an order against the father and it has been held that the origin of this law is the prevention of vagrancy .
I am therefore strongly inclined to think that the words "unable to maintain itself" cannot be confined as suggested, to the tender age of the child but must also have reference to its financial dependency This view seems to me to gain support from other words in the section The first is the words almost directly after words are "a monthly allowance for the maintenance" That clearly points to the object of the payment which is to be ordered, and it seems to me that if the payment is required for maintenance it necessarily follows that the payment should not be ordered Then there are the words in section 489 'change in the circumstances' If the words 'child unable to maintain itself' had not reference only to the tender age of the child, it seems to me that so wide a word as 'circumstances' would not have been used in this latter section."

But it cannot be said that this decision favours an interpretation taking the age beyond 18 only The learned Judges would not confine the expression to a person of tender years However in In re, *Moideen*[7], Sadasiva Ayyar J, observes though in a different context :

"I think the inability referred to in the section (section 488, Criminal Procedure Code) relates to absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts and does not refer to inability through poverty or absence of means This view is supported by the principle underlying the decision in the matter of petition of *W B Todd*[8] where it was held that a child deaf and dumb and unable to maintain itself is entitled to maintenance although it may have arrived at the age of majority"

In *Kent* v. *Kent*[9], Devadoss, J, relies on In re, *Moideen*[7], for the observation "even a grown-up child, if unable to maintain itself, is entitled to get maintenance from the father if he has the means" In *Kanniah Naidu* v *Rajammal*[10], Lakshmana Rao, J., upheld an order of the Court below awarding maintenance in the following words .

"The girl is unable to maintain herself and section 488, Criminal Procedure Code, does not limit the right of maintenance to minors The age of the girl is therefore immaterial and the revision petition is dismissed"

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1 25 M L J 349 I L R 37 Mad 565
2 A I R 1933 Lah 1026
3 A I R. 1935 Cal 488
4 A I R 1949 Bom 36
5 A I R 1961 Ker. 297.
6 (1919) 37 M L J 361 at 363 and 364.
7 (1913) 25 M L J 335 at 356
8 (1873) 5 N W H C R 287
9 49 M L J 335 A I R 1926 Mad 59
10. (1941) 2 M L J. 75 : A.I R. 1941 Mad. 684.

Panchapakesa Ayyar, J., in *Subbamma* v *Venkata Reddi*[1], and Anantanarayanan, J., (as he then was) in *Ibrahim* v *Saidani Bi*[2], pointed out that the aforesaid ruling of Lakshmana Rao, J., is extremely brief and does not discuss the legal connotation of the word 'child' occurring in section 488 (1), Criminal Procedure Code. In *Ramanachiappa* v *Yasodammal*[3], before Kunhamed Kutti, J., the contention was raised that the boy aged 17 years should not be deemed to be a child within the meaning of section 488, Criminal Procedure Code After referring to the conflict of views between *Subbamma* v *Venkata Reddi*[1], and *Kanniah* v *Rajammal*[4], the learned Judge expressed himself in respectful agreement with the view expressed in the Calcutta decisions, *Purnasashi Devi* v *Nagendra Nath*[5], and *W L Faria* v *Anita Menene Faria*[6], where the view was taken that the fact that a son is 17 or 18 or 19 is no ground for refusing maintenance.

We shall now consider the cases of other High Courts where the word 'child' has been understood as meaning simply 'son' or 'daughter' In *Bhagat Singh* v. *Emperor*[7], a case of the Punjab High Court, claim for maintenance was made by a son aged 20 He was lame having a deformed foot The Sessions Judge thought that he was not a 'child' for the purpose of section 488, Criminal Procedure Code. Chevis, J., stated.

> " But as I understand the section the word 'child' as used there simply means son or daughter. In my opinion, reference to age is purposely omitted in the section, the object being that any son or daughter is entitled to claim maintenance, whatever his or her age may be, so long as he or she is unable to maintain himself or herself"

In *Rajwarin* v. *Lagan Singh*[8], the question before the Patna High Court was whether the maintenance awarded to girl should be limited to her attaining 14 years of age. After referring to the decisions in *Krishnaswami Iyer* v *Chandravadana*[9], and *Bhagat Singh* v *Emperor*[7], Jwala Prasad, J., observed.

> " In the absence of any definition of the word 'child' in the Act, or to any limit of age placed upon it, I would accept the decision of the Punjab High Court that the maintenace allowed is to continue so long as the person is unable to maintain himself The omission to define the age was probably intentional so as to allow the maintenance to continue even throughout the life, if owing to some mental or corporeal defect, the person is unable to maintain himself"

In *Ahmad Shaikh* v *Bai Fatma*[10], the claim for maintenance considered was that of a daughter aged 21 and the contention was that the maintenance should be confined to minors Reference was made to the decision of this Court in *Krishnaswami Iyer* v. *Chandravadana*[9], and the decision of the Calcutta High Court to the similar effect in *Hemanta Kumar* v *Monorama Debi*[11] Beaumont, C J, with whom Wassoodew, J, agreed held.

> " The word 'child' according to its use in the English language has different meanings according to the context In certain contexts it may include descendants of more than remote degree, and be equivalent to 'issue'. But, at any rate, where the word 'child' is used in conjunction with parentage, it is not concerned with age No one would suggest that a gift, 'to all my children' or " to all the children of *A* " should be confined to minor children In section 488, Criminal Procedure Code, the word is used with reference to his father There is no qualification of age; his only qualification is that the child must be unable to maintain itself In my opinion, there is no justification for saying that this section is confined to children who are under the age of majority"

In *State* v *Ishwarlal*[12], Mudholkar, J., referring to the conflict of case-law on the question whether the age of the child is material for determining the point of a father's liability to maintain the child, stated.

> " On the one hand it has been held that the word 'child' used in section 488, Criminal Procedure Code, means son or daughter and that reference to age is purposely omitted from it because the object of the section is to confer a right on any son or daughter to obtain maintenance from the father so long as he or she is unable to maintain himself or herself On the other hand it has been held that the word 'child' used in the section means one who has not attained majority."

1 (1950) 1 M L J 158 A I R 1950 Mad 394
2 (1964) 2 M.L J 70 (1964) M L J (Crl) 402
3 Crl R C 100 and 99 of 1962
4 (1941) 2 M L J 75 A I R 1941 Mad 684
5. A I R 150 Cal 465
6. A I R. 1951 Cal. 66.
7 6 I C 960.
8 61 I C 64
9 (1913) 25 M L J 349 I L R. 37 Mad. 565.
10 A I R 1943 Bom 48
11 A I R 1935 Cal 488
12. A I R. 1950 Nag 231.

The learned Judge expressed himself in favour of the decisions which gave a wider meaning to the word ' child ' observing

" In the first place the section itself omits reference to the age of the child, and so to hold that a child means only a minor person would be reading something into the section which is not there. The second reason is the one given by Ram Lall, J, in his referring order in *Muhammad Yar* v *Ali Muhammad*[1]. According to the learned Judge

. if the word ' child ' is to be restricted to a person who has not yet attained the age of majority, a cripple or an imbecile would be left without any legal remedy against his well-to-do parents "

In *Purnashashi Devi* v *Nagendra Nath*[2], Das Gupta, J., with whom Lahiri, J., agreed rejected the contention that a son aged 17 or 18 or 19 will not come within the meaning of ' child ' under section 488, Criminal Procedure Code, observing :

" It seems to me that the word ' child ' has been deliberately used to leave the Courts free to order maintenance for such sons and daughters as are unable to earn livelihood for themselves, having due regard to the class of society to which they belong and other surrounding circumstances. The fact, therefore, that the son is 17 or 18 or 19 is, in my opinion, no ground for refusing maintenance on this account."

In *W. L Faria* v. *Anita Menene Faria*[3], the question was whether a daughter aged 18 years could be awarded maintenance as child The earlier decision in *Purnashashi* v *Nagendra Nath*[2], was followed, and the right to maintenance was upheld In *Bakshi Monilal* v. *M T Ram Lubhai*[4], maintenance was claimed on behalf of a daughter over 18 years of age Differing from the decision of this Court in *Subbamma* v. *Venkata Reddy*[5], and the decision of the Rangoon High Court in *U Ba Thaung* v *Ma Aye*[6] and following the decision in *W L Faria* v *Anita Menene Faria*[3], it was held that the deciding consideration is whether the child or son is able to maintain himself or herself and not the age In *Thambuswamy* v *Ma Lone*[7], the Lower Burma Chief Court was hesitant to adopt the view taken by this Court in *Krishnaswami Iyer* v *Chandravadana*[8], as it appeared to that Court that the Legislature " may have intended to make a father liable for the maintenance of his child throughout its life if owing to some mental or corporal defect it is unable to maintain itself "

In *U Ba Thaung* v *Ma Aye*[6], the question did not arise directly for consideration. But the learned Judges were hesitant to lay down a rigid rule that no order could be made in favour of a child if it has become a major In *Ma B Mya* v. *U Ko Ko Gyi*[9] Mackney, J , observes .

" It appears to me that the word ' child ' merely expresses a relationship which may exist whether the child is under the age of majority or over the age of majority A child which has reached majority may for some reason be unable to maintain itself, in which case the parent will under section 488, Criminal Procedure Code, be liable to maintain it "

In *Mohammad Yar* v *Ali Muhammad*[10], in view of the conflict of opinions on the question Ram Lall, J , referred the matter to a Bench But the Division Bench did not consider it necessary to define the word ' child ' on the facts of the case before the Bench It was observed ·

" It is clear that whatever view is taken, that is to say, whether the word ' child ' means a human being under any particular age or whether it is used in the statute in the more general sense as meaning any offspring however old, of a human being, it is qualified by the phrase " unable to maintain itself" In this case the person for whose maintenance allowance was sought was at the time of the proceedings aged 18 and we are informed is now 20 The learned Magistrate has found positively that he is healthy and does not suffer from any illness Such a person must be presumed to be capable of maintaining himself "

In *Ismail Sheriff* v *Nasarin*[11], the question was whether a daughter who was minor at the time of petition could claim maintenance subsequent to the period she completed

1. A.I R. 1941 Lah 92.
2. A I R 1950 Cal 465 at 466.
3. A.I R. 1951 Cal 66
4. A I R 1953 J K 16
5. (1950) I M L J 158 A.I R. 1950 Mad. 394.
6. A.I.R. 1932 Rang. 94.
7. 37 I C 311
8. (1913) 25 M L J 349 I L R 37 Mad. 565.
9. A I R 1937 Rang 370 at 372.
10. A I R 1941 Lah 92 at 94.
11. (1965) M L J. (Crl) 83 at 85.

18 years Hombe Gowda, Offg C J , expressed the view that the Legislature did not intend restricting the scope of section 488, Criminal Procedure Code, to a boy or girl below the age of 18 years with the following observations :

> " There is therefore no justification to interpret the word ' child' in sub-clause (1) of section 488 of the Code of Criminal Procedure to mean a child below 18 years of age I am of the opinion that age is purposely omitted from the section because the object of the Legislature was to provide maintenance as long as the son or the daughter is not capable of maintaining himself or herself .. The relevant point for consideration under section 488 (1), Criminal Procedure Code, is whether the child is capable of maintaining himself or herself without the aid from the father and it has nothing to do with the age If really the Legislature intended the word ' child ' in sub-clause (1) of section 488, Criminal Procedure Code, would have reference only to a boy or a girl below the age of 18 years nothing prevented the Legislature from making it quite clear As rightly pointed out by some of the learned Judges the Legislature could have made it clear by saying ' minor child' "

In *Abdul* v *K M Azra*[1], the question was whether a daughter who had become major was entitled to be maintained thereafter under the provision of section 488, Criminal Procedure Code. Nigam, J , rejected the contention that a person as soon as he or she attained the age of 18 years ceases to be entitled to be maintainable In the learned Judges' opinion the key to the provision is furnished in the case of the child by the words " unable to maintain itself " The learned Judge proceeding observes :

> " In different communities and different circumstances these words may mean different things Among the labouring classes it may even be possible to hold that a healthy boy aged 16 is not unable to maintain himself I am of opinion that the Legislature purposely omited to refer to any particular age The emphasis is on the words 'unable to maintain itself' "

Having given our careful consideration to the discussion of the matter in the several decisions, with respect we are unable to agree with the view expressed in some of the decisions that the provision of section 488, Criminal Procedure Code could be availed of by a person irrespective of his age, the only requirement being that he should be unable to maintain himself or herself as the case may be, and the father having sufficient means has neglected or refused to maintain Nor do we find reason for restricting the meaning of the word ' child ' to a person of tender years The words of a statute when there is a doubt their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view The meaning of a word, when doubtful, should not be sought for so much in a strictly grammatical or etymological propriety of the language nor in its popular meaning But it must be sought for in the subject or on the occasion in which the word has been used, the object which the statute seeks to attain This provision has been in the statute book from 1856, and the object of the provision, it will be seen, is not to punish a parent for his past neglect but to prevent vagrancy by compelling the parent who can do so to support the children who are unable to maintain themselves and have at least a moral claim to be so supported—see *Nagendramma* v *Ramakottayya*[2]. The section more or less in its present form is to be found originally in two parallel enactments· one, statutes governing the Presidency Towns and the other applicable to the territories outside. The corresponding provision is section 43 of Act XIII of 1856 passed by the Legislative Council of India for regulating the Police of the Towns of Calcutta, Madras and Bombay and certain settlements The relevant part of section 43 runs thus :

> "If any person, having sufficient means, neglects or refuses to maintain his wife or any legitimate or illegitimate child unable to maintain himself, it shall be lawful for a Magistrate, upon due proof thereof to order such person to make a monthly allowance . "

The next section in that Act, section 44 penalising taking or enticing away women or female children runs thus :

> " Whoever unlawfully takes away, or detains against her will, any woman or female child , or unlawfully takes, or entices away, or detains, any female child under the age of fourteen years, out of possession. . ."

One thing is clear When the two sections are read together, the word ' child' is not limited to a child of tender years Otherwise there is no necessity for limiting the age

1 A I R 1965 All 125.
2. (1955) 1 M L J. 25 . A I.R 1954 Mad. 713 at 719

in section 44 to fourteen The corresponding provision in the Code of Criminal Procedure as to powers of the Courts of criminal jurisdiction not established by Royal Charter, Act XXV of 1861 passed by the Legislative Council of India, was section 316 The languge is similar to the one in section 43 of Act XIII of 1856 Here also the word "himself" s found after the words "unable to maintain" This provision in Act XXV of 1861 comes under Chapter XXI headed "Of the maintenance of wives and children" The arrangement of the Chapters in that Code is also significant Chapter XIX deals with security for good behaviour, Chapter XX with local nuisance and Chapter XXII, with disputes relating to the possession of land or the rights of use of any land or water which are found in the current Criminal Procedure Code (Act V of 1898), under Part IV, that is, prevention of offences. Act XIII of 1856 relating to Courts established by Royal Charter and Presidency Towns was replaced in 1867 by Act VIII of 1867 and there also while referring to the child the word used is "himself" in the phrase "unable to maintain himself" In Act X of 1872 which replaced Act XXV of 1961 the corresponding section is section 536 and the words in regard to the ability of the child are the same "unable to maintain himself" Section 536 is found under Part XI headed "Preventive Jurisdiction of Magistrates," wherein provisions are found for dispersal of unlawful assembly, security for keeping peace, security for good behaviour, disputes relating to possession of land or water and local nuisance The change in the word "himself" to "itself" is first found in Act IV of 1877, Presidency Magistates Act, in section 234 When the consolidating and amending Act relating to Criminal Procedure, Act X of 1882, was passed the provision relating to maintenance of wives and children took its present place under the Code, in Chapter XXXVI, under Part VIII headed "Special Proceedings" and the words "unable to maintain *himself*" were amended as "unable to maintain *itself*" There is no material change in the current Criminal Procedure Code (Act V of 1898) in regard to the provision now under consideration.

Reference to Regulation I of 1813 applicable to the Island of Bombay in regard to parents' liability to maintain their children is of some interest. This Regulation under the title "Compelling parents and others to maintain their families by Article 1 provided that the father, grandfather, mother and children of impotent poor in the town and factory of Bombay, being of sufficient ability, shall relieve and maintain them, according to such rate and in such manner as by the Justices of the said town and factory of Bombay, at their Petty Sessions shall be assessed and directed. In England where the father's obligation to maintain his children, though recognised by both Courts of Law and Equity, was considered only as a duty of imperfect obligation. In Simpson on the Law of Infants, 4th Edition, at page 121, it is stated·

"A series of statutes, generally known as the Poor Laws, has been passed to enforce to some extent the obligations in question The first statute was that of 43 Eliz c 2 (Poor Relief Act, 1600) By section 7 it was enacted that the father and grandfather, and mother and grandmother, and the children of every poor old, blind, lame, and impotent person, or other poor person not able to work, *being of sufficient ability*, should at their own charges relieve and maintain every such poor person in the manner therein mentioned"

By 31 and 32 Vict C. 122, section 37, any parent wilfully neglecting to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of *fourteen* years, was punishable with imprisonment Provision for bastards or illegitimate children was made only in 1844 by an Act which gave a woman a right to apply for an order against the father This however limitated the period till the child reached 13 years or up to the marriage of the mother The liability in respect of children ceased at 16 years The law in England sufficient for our purpose may be summed up in the following passages found in Halsbury's Laws of England, Simonds Edition, Volume 21, at pages 189 and 190 .

"At common law there is no actual legal obligation on a father or mother to maintain a child unless the neglect to do so would bring the case within the criminal law By statute a parent who neglects, abandons, or exposes or causes to be neglected, abandoned or exposed an infant under the age of sixteen in a manner likely to cause him unnecessary suffering or injury to health commits an offence

Under the old poor law the father and the mother, after the death of the father, and also the grandfather and grandmother, if able to do so, were bound to maintain a child who could not support

himself A man was liable to maintain his wife's children as part of his family until they attained the age of sixteen or until the death of their mother

Now under the National Assistance Act, 1948, each spouse is liable to maintain his or her children under the age of sixteen years and may be required to repay any assistance given to such child under the Act"

Under the Hindu Law, every Hindu has been under the legal obligation to maintain his aged parents, his wife, his minor sons, whether legitimate or illegitimate, and unmarried daughters This obligation has been personal in character and arose from the very existence of their relation between the parties Since, under the Hindu Adoption and Maintenance Act of 1956 there is a special provision, section 20, providing for the maintenance of children and aged parents Under the section a legitimate or illegitimate child may claim maintenance from his or her father or mother so long has the child is a minor By sub-clause (3) the obligation of a person to maintain his or her daughter who is unmarried extends in so far as the unmarried daughter is unable to maintain herself out of her own earnings or other property Under the Muhammadan Law also a father is bound to maintain his sons until they attain the age of puberty He is also bound to maintain his daughters until they are married But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease—see Mulla's Muhammadan Law, 15th Edition, at page 303 It is pointed out in the Law relating to Minors by Trevelyan, 5th Edition, at page 206, that according to the Hindu, Mahomedan and English Laws alike, it is the duty of a father to support such of his minor children as are incapable of supporting themselves

It is in this background we have to examine the scope and content of the word 'child' as used in section 488, Criminal Procedure Code, whether it is used in the sense of progeny without reference to age, or whether the state of childhood or the idea of immaturity or infancy is also implied in the expression While interpreting this provision we cannot lose sight of the fact that the object of introducing this provision in the Criminal Procedure Code was prevention of vagrancy on the analogy of the Poor Laws and Bastardy Acts in the United Kingdom. The fact remains no doubt that there has been no definition of the word 'child'; nor is there limitation on the age of the child Minority is not specifically referred to, as found in the Hindu Adoption and Maintenance Act, 1956 or marriage indicated as the upper limit in the case of a daughter The omission of the age of the child in the Act has of course to be taken as deliberate. 'Child' normally means an infant, though it has also been used in several Acts as referring to issue or progeny As indicated in some of the decisions 'child' can also mean descendant of the second and third degrees In Webster's New 20th Century Dictionary the meaning given to the word 'child' are. (1) an infant, a baby, (2) an unborn offspring, (3) a boy or girl in the period before puberty, (4) a son or daughter, a male or female descendant in the first degree, in law a legitimate son or daughter . . . a descendant however remote In Halsbury's Laws of England, Simonds Edition, Volume 21, at page 135 it is stated

"In statutes passed for the protection of persons of immature years or dealing with their criminal acts the word 'child' is usually employed, instead of 'infant' to denote such a person, the term being thus applied to persons of varying ages and contrasted with the expression 'young person' which is used to denote a somewhat more advanced age In the Children and Young Persons Act, 1933, which repealed and consolidated many of the previous statutes, 'child' is defined generally as a person under the age of fourteen years, and 'young person' as a person who has attained the age of fourteen years and is under the age of seventeen years For the purpose of the Children Act, 1948 'child' means a person under eighteen years of age For the purposes of any enactment relating to the prohibition or regulation of the employment of children or young persons, any person who is not over compulsory school age is deemed to be a child within the meaning of that enactment"

Under the Family Allowance Act, 1945, the National Insurance Act, 1946 and the National Insurance (Industrial Injuries) Act, 1946 a person is treated as a child whilst he is under the upper limit of compulsory school age and during any period before his 18th birthday In English Law, apart from statute, infancy is the term applied to the period of life, whether in males or females, which precedes the completion of the twenty-first year, and persons under that age are called infants. An

infant does not possess full legal competence and is regarded as of immature intellect and imperfect discretion—see page 134 in Halsbury's Laws of England, Simonds Edition, Volume 21. But in English Law also the expression 'child' can be found defined in statutes in respect of relationship as born to certain persons

Here in India in the Factories Act (LIII of 1948) 'child' is defined as a person who has not completed the 15th year In the Women and Children's Institutions Licensing Act (V of 1936) 'child' means a boy or girl who has not completed 18 years In the Tea Districts Emigrant Labour Act (XXII of 1932) 'adult' means a person who has completed his 16th year and a 'child' means a person who is not an adult In the Plantation Labour Act (LXIX of 1951) 'child' means a person who has not completed his 15th year In the Child Marriage Restraint Act (XIX of 1929) 'child' means a person who if male is under 18 years of age and if a female under 15 years of age In Orphanages and other Charitable Homes (Supervision and Control) Act (X of 1960) 'child' means a boy or a girl not completing 18 years But our attention has not been drawn to any enactment where a 'child' has been defined to include a person above 21 years or even over 18 years.

Though section 488 itself does not define a child or limit the age of a child, there are certain indications in the section, apart from the object of the enactment, which are significant and give a clue for interpreation The words 'child unable to maintain itself' read together in the context discussed above leave the impression of a human being which by reason of its state of growth has to depend on someone for its support and required another to take up its care and protection, a minor who normally cannot be expected to embark on his own We have also to bear in mind that the corresponding provisions in England at the time the law was introduced here, provided support only till 16 The use of the word 'itself' in relation to 'child' cannot be passed over It must be noticed that originally the word was 'himself' Instead of using 'himself' or 'herself' a neutral word 'itself' is used As noticed in the referring order it is a pertinent matter to take note of. Anantanarayanan, J, (as he then was) observes in his order :

> "If the Legislature had intended that the word 'child' applies strictly to issue, without any reference to age, it would have been natural to expect that words like 'himself' or 'herself' would have been used"

In using the word 'itself' it appears to us that the Legislature was emphasising the absence of a developed personality. It conveys the idea that the child is not possessed of full legal competence It connotes immaturity of intellect and imperfect discretion and it looks as if the Legislature considered it not proper to give a distinctive personality to the child in the work-a-day world, and term it 'himself' or 'herself' In our view the word 'child' is intended to convey in the context, apart from the relationship an idea of infancy This view of ours finds confirmation if reference is made to clause (8) of section 488 which indicates the forum for initiation of proceedings under the section Clause (8) runs thus :

> "Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child"

For the proceeding only the residence of the wife or mother of the illegitimate child is referred to. It seems as if the framers of the Code thought that the child contemplated in the section is one under tutelage, they do not assign it a residence and take notice of only the residence of the mother It may be that in certain circumstances and among some class of people depending on environment, mode of life, habits, scale of living and opportunities for employment, even very young persons may be precocious and capable of maintaining and protecting himself. But in our view these are special cases where a person shown to be a child under 18 may not be able to claim maintenance being in a position to maintain himself A person who has become a major and is legally capable of entering into contracts may be presumed to be capable of maintaining himself.

There is another aspect of the matter that will have to be borne in mind. Complications are likely to arise when a man is called upon to maintain another over whose actions he has no control, over whom no personal guardian could even be got appointed and whose person the Court cannot commit to the custody of any guardian Under the Guardians and Wards Act, guardianship over a person in the case of testamentary or natural guardian ceases on the minor becoming a major, that is, on the completion of 18 years Personal guardianship can be continued till 21 if a guardian is appointed through Court.

In this connection we may usefully refer to the following passage in Corpus Juris Secundum, volume 14, page 1109, giving the meaning of the word ' child ':

> "The term has a second well-understood meaning, irrespective of parentage, and imports minority, infancy, or the early years of life .In laws for the protection of children, the term ' child ' means generally the young under the age of puberty and in this age sense the word has been defined as meaning an infant, a young person, a youth, or one of tender years one not old enough to dispense with material aid and care."

Viewed in the light of the above provision the observation of Panchapakesa Ayyar, J, in *Subbamma* v *Venkata Reddi*[1], that if age is not criterion a man of 77 unable owing to senility to maintain himself can claim maintenance from his father aged 97 as his child, cannot be considered to be carrying the matter a little too far as considered by Nigam, J., in *Abdul* v *K M Azra*[2]. The reasoning of Ram Lall, J, in *Muhammad Yar* v *Ali Mohammad*[3], that if the word ' child ' is to be restricted to a person who has not yet attained the age of majority, a cripple or an imbecile would be left without any legal remedy against his well-to-do parents, does not with respect appeal to us Section 488, Criminal Procedure Code, is a summary and cheap remedy and the original object was to prevent vagrancy It is not as if the personal laws may not provide for maintenance of adult sons if they are disabled by infirmity or disease We have already referred to the provisions under the Muhammadan Law and Hindu Law in regard to the same. The fact that such an interpretation would be expedient and convenient is not always a sure guide, as the Legislature, if necessary, can intervene to fill up any lacuna. In our view the expression ' child' in section 488, Criminal Procedure Code, while it postulates the immediate relationship of the claimant for maintenance with the person who is called upon to pay maintenance, by the closely following neutral pronoun ' itself' signifies and emphasises the infancy of the claimant The inability to maintain ' itself' looks to us to be related to infancy.

The expression ' child ' of course cannot be confined to a child of tender years, a person below 14 or 16 as has been contended for in some cases, since in that case there can be no doubt about its inability to maintain itself The question of ability to maintain one self can arise only in the case of young persons during adolescence.

In the light of the above discussion we are inclined to agree with the view of Panchapakesa Ayyar, J, in *Subbamma* v. *Venkata Reddi*[1], that the meaning of the word ' child ' in section 488 must be taken to be a minor whether under the Indian Majority Act or the Court of Wards Act or the Guardians and Wards Act and, with respect differ from the decisions which have taken the view that any person who is unable to maintain himself or herself of whatever age without limit would be a child under section 488 because he is a child of his father The result would be a son or daughter under 18 would be a child under the Act and where a guardian is appointed by Court, the childhood for the purpose of section 488 would continue during the nonage or legal infancy, that is, till the completion of 21 years

Examining the facts of the present case in the light of the above conclusion it follows that the boy Balakrishnan is not entitled to any relief He has not only completed his 20th year but there is a clear finding of the Court below that he is capable of doing some work and that he was doing some work and earning Rs 2 to Rs. 3 per day. The rejection of his claim for maintenance by the Court below has

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1. (1950) 1 M L.J. 158 : A I R 1950 Mad. 943.
2. A.I R 1965 All 125.
3. A.I.R. 1941 Lah. 92.

therefore to stand As regards the girl Ramanujam the position is different She is an unmarried girl and there is no clear finding by the lower Court that she has completed 18 years on the date of the application It must be noticed that even if she completes 18 years pending disposal of the petition, the Court can order her maintenance from the date of the application till she attains the age of 18. In the circumstances the order against Ramanujam is set aside and the matter is sent back to the lower Court for fresh disposal in the light of the above observations. The revision is ordered accordingly.

R M. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE R. SADASIVAM

Raja Goundan and another .. *Petitioners**

Criminal Procedure Code (V of 1898), section 403—Autre fois acquit—*Scope of—Tried and acquitted—Meaning of—Withdrawal of a case resulting in statutory acquittal—If a bar to a subsequent prosecution*

Criminal Procedure Code (V of 1898), sections 202 and 203—Procedure under

Criminal Procedure Code (V of 1898), section 439—Power of revision—Scope of

It is no doubt true that the principle of *autre fois acquit* enacted in section 403 of the Criminal Procedure Code has been held applicable even to cases of statutory acquittal under sections 247, 248, 345 and 494 of the Code The word ' tried ' or ' trial ' has not been defined anywhere and in cases tried as summons cases without framing any charge, the trial might be said to commence with the issue of notices to the accused and when the accused appears or is brought before a Magistrate But even in such cases before it could be said that a trial has commenced, the Court should have taken cognizance of a complaint and should have issued process for the accused to appear Where a complaint has been dismissed even at the stage of an enquiry under section 202 of the Code and the stage of issue of process to the accused has not reached, it cannot be said that such a dismissal will be a bar to a fresh trial of the accused within the meaning of section 403 of the Code

Section 202 of the Criminal Procedure Code does not contemplate the dismissal of a part of a complaint and holding an enquiry about the truth of the remaining part A dismissal of a complaint can be made only under section 203 of the Code and it is improper to dismiss a complaint even in part when the enquiry under section 202 is still pending

It is no doubt true that the revisional jurisdiction of the High Court ynder section 439 of the Code is not to be lightly exercised when invoked by a private complainant against an order of acquittal But where the facts disclose that the acquittal is manifestly illegal and requires to be corrected the High Court will not hesitate to interfere to set right a glaring defect in procedure or a manifest error of law leading to miscarriage of justice

Petition praying that in the circumstances stated therein the High Court will be pleased to call for the concerned records in P R C No 22 of 1965 on the file of the Court of the Sub-Magistrate, Sankari and quash the proceedings therein.

Fyzee Mohamood, for Petitioners.

S. R Srinivasan, for Complainant

K A Panchapakesan, for Public Prosecutor on behalf of the State.

The Court made the following

ORDER :—Petitioners in Crl M P No 3247 of 1965 are the accused in P R C. No 22 of 1965, on the file of the Sub-Magistrate, Sankari, initiated on a police charge-sheet under section 307, Indian Penal Code The first petitioner Raja Goundan is the husband of second petitioner Sattiammal and the son of the complainant Chinna Goundan Chinna Goundan got himself divided from his four sons But he was living with and looking after the properties of his minor son Subramaniam Raja Goundan was inimically disposed towards his father as he felt that his father was giving all his income to his youngest son but was also giving him trouble On the morning of 8th September, 1965 at 7 A.M when Chinna Goundan went to the well owned in common by his sons, Raja Goundan and Subramaniam to irrigate the lands of Subramaniam, Raja Goundan prevented him from doing so, picked up a quarrel and, at that time, both Raja Goundan and his wife Sattiammal lifted him and threw him into the well saying that it was better that they got rid of him But hearing his

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* Crl Misc P No. 3247 of 1965 and Crl. R.C. No. 178 of 1966. 6th April, 1966.

shouts, the neighbours rushed to the well and rescued him. He got himself treated for the simple injuries by the doctor at the Government Hospital, Sankari and gave a complaint to the Police on the same day But as the police did not make any enquiry, or arrest the accused, Chinna Goundan preferred a complaint before the Sub-Magistrate, Sankari, on 15th September, 1965 The Sub-Magistrate, Sankari recorded the sworn statement of Chinna Goundan, and took the case on file under section 323, Indian Penal Code and posted it for enquiry under section 203, Criminal Procedure Code But, on 18th September, 1965, Chinna Goundan entered into a compromise with the accused in the presence of Panchayatdars and on 20th September, 1965, the Sub-Magistrate, Sankari, permitted him to withdraw the complaint and acquitted the accused under section 248, Criminal Procedure Code Subsequently, the police filed the charge-sheet dated 20th September, 1965 in the Sub-Magistrate's Court on 22nd September, 1965 and it was taken on file as P R C No. 22 of 1965. The accused, Raja Goundan and Sattiammal have filed this Criminal Miscellaneous Petition No. 3247 of 1965 to quash the proceedings in P R C. No 22 of 1965 on the file of the Sub-Magistrate, Sankari, on the ground that the acquittal on the private complaint operated as a bar to the prosecution on the same facts on police charge-sheet.

During the hearing of the Criminal Miscellaneous Petition, I found several suspicious circumstances regarding the disposal of the private complaint and entertained grave doubts about the legality and validity of the order of acquittal passed by the Sub-Magistrate, Sankari and passed the order dated 7th February, 1966 for *suo motu* taking up in revision to consider the validity and legality of the order dated 20th September, 1965 in C C No. 3464 of 1965 on the file of the Sub-Magistrate, Sankari, for the reasons stated therein, and it forms the subject-matter of Criminal Revision Case No 178 of 1966.

The rule *autre fois acquit* under section 403, Criminal Procedure Code, has been held in several cases to apply also to statutory acquittals under sections 247, 248, 345 and 494, Criminal Procedure Code In re *Dudekula Lal Sahib*[1], Abdur Rahim, J, pointed out that the word 'tried' or 'trial' has not been defined anywhere, that the trial of a summons case commences as soon as the process is issued and that if the Magistrate took cognizance of an offence and issued process, the proceedings are to be terminated by an order, either of acquittal or of conviction, unless the proceedings are stopped under section 249, Criminal Procedure Code But Napier, J, following an earlier bench decision In re *Kotayya*[2] to which he was a party, held that a person could not be said to have been tried in a case, while he has not been served with the summons On this difference of opinion, the matter went before Wallis, C J, who concurred with Abdur Rahim, J, that the acquittal of the accused on the withdrawal of the case by the Public Prosecutor under section 494, Criminal Procedure Code was a bar to a subsequent trial for the same offence. He has observed that he found great difficulty in saying that the accused had been tried and acquittal within the meaning of section 403, Criminal Procedure Code, in the case of statutory acquittals According to him, the intention of the Legislature was that the withdrawal by the Public Prosecutor at any stage in those trivial cases which are tried as summons cases without the framing of any charge was to have the same effect as a withdrawal of a case after a charge had been framed In *Kutumbayya* v. *Lakshminarasimha Rao*[3], it was held that

> "as the trial in a summons case commences with the issue of notice to the accused, the accused was both tried and acquitted, when he was acquitted under section 247, Criminal Procedure Code, on account of the absence of the complainant, and, therefore, section 403, Criminal Procedure Code, would operate as a bar to a further trial"

In *Kandaswami* v *The Executive Officer, Panchayat Board, Attur*[4], it has been held that under section 242, Criminal Procedure Code, the trial of a summons case begins when the accused appears, or is brought before a Magistrate and not when he is asked to show cause why he should not be convicted and hence the withdrawal

1. (1917) 33 M L J 121 I L R 40 Mad 976.
2. (1917) I L R. 40 Mad 977
3. (1942) 2 M.L.J. 221 ; A.I.R. 1943 Mad. 6.
4. (1947) 1 M.L J. 172 . A I R 1947 Mad. 306.

of a complaint under section 248, Criminal Procedure Code even before the accused is questioned under section 242, Criminal Procedure Code would amount to a trial and acquittal within the meaning of section 403. Criminal Procedure Code

In the Code of Criminal Procedure, 1898 in dealing with definitions under section 4, it is stated that "trial means the proceedings taken in Court after a charge has been drawn up, and includes the punishment of the offender". But this definition, which does not find a place in the subsequent Codes, is not of any help in construing the word 'trial' in summons cases. In *Emperor* v. *John McIver*[1], in considering the proper time for raising the plea of *autre fois acquit* in a criminal trial, it has been stated at page 357 that

> "the trial commences with the arraignment of the accused that is to say when the charge is read out to the accused and he is called upon to plead to it"

At page 375 of the same decision, the observation in *Venkatachannava* v *Emperor*[2], that a "trial may reasonably be taken to be every proceeding which is not an enquiry" has been referred to with approval In *Haveli Ram* v. *Municipal Corporation of Delhi*[3], the two views with regard to the meaning and scope of the word "tried" in sub-section (1) of section 403, Criminal Procedure Code, one view being that the accused must be present in Court on being summoned, before it can be said that the trial has commenced and the other being that once the Court has taken cognizance of a complaint or a criminal case and has ordered steps towards the trial and what it has done is proceeding in the nature of a trial, are referred to and, according to that decision, the latter view seems to accord more with the *Explanation* to section 403, Criminal Procedure Code because if it was the intention of the Legislature to exclude acquittals under sections 247 and 248, Criminal Procedure Code from the scope of section 403, Criminal Procedure Code, that could have been as specifically provided for as stopping of proceedings under section 249, Criminal Procedure Code or the discharge of the accused or an entry made upon a discharge under section 273, as has been done in that *Explanation* Thus whatever view is taken it could not be said that the accused in this case were tried on the private complaint given by Chinna Goundan as no process was issued to them as the case was in the stage of enquiry under section 202, Criminal Procedure Code when they were acquitted.

In *Jawana Singh* v *Bhadai Shah*[4], the Supreme Court has held that where on receipt of a complaint the Magistrate proceeded to examine the complainant on oath under section 200, Criminal Procedure Code and made the order in these words "To S I for instituting a case and report" the order is one under section 202, Criminal Procedure Code and the Magistrate has taken cognizance of the offence on the complaint and an appeal by the complainant against the order of acquittal lies to the High Court under section 417 (3), Criminal Procedure Code The learned Advocate for the accused relied on this decision and contended that the trial of the summons case on the complaint of Chinna Goundan had commenced in this case as the Sub-Magistrate had taken cognizance by ordering an enquiry under section 202, Criminal Procedure Code But even according to the broader of the two views of the word "trial", as stated in *Haveli Ram* v. *Municipal Corporation of Delhi*[3], a trial in a summons case commences only when the Court takes cognizance of a complaint and had ordered issue of process for the accused to appear There is a clear distinction between an enquiry and a trial, as would be evident from the scheme of the Criminal Procedure Code In *Chandra Deo Singh* v *Prokash Chandra Bose*[5], the Supreme Court has discussed the scope of section 202, Criminal Procedure Code and pointed out that it is clear from the scheme of Chapter XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued and that an enquiry under section 208, Criminal Procedure Code can in no sense be characterised as a trial for the simple reason that in law there could be but one trial for an offence In *Haveli Ram* v *Municipal Corporation of Delhi*[3], it has been held that the withdrawal of a complaint may be made either

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1. 70 M L J 635 : A I R 1936 Mad. 353 (F.B).
2. (1920) 38 M.L.J 370 at 384.
3. A.I.R. 1966 Punj. 82.
4. A.I.R 1964 S C 1541
5. A.I.R. 1963 S.C 1430.

even before process for summoning the accused is issued, or after the process has been issued, but before the accused has been served and has appeared, or after he has appeared, and that Chapters XVII and XX should not be read in separate and isolated manner, but must be read collectively with section 403, Criminal Procedure Code But I have very grave doubts whether section 248, Criminal Procedure Code can be invoked even in a summons case by a complainant; when the case is still in the stage of the proceedings covered by Chapter XVI of the Code of Criminal Procedure, in other words, where the stage of issue of process had not reached. The proper order for a Magistrate to pass before that stage is reached is to dismiss the complaint and not to pass an order of acquittal. The acquittal of the accused in C C No. 3464 of 1965 on the file of the Sub-Magistrate, Sankari, cannot operate as a bar to the trial of the accused in P R.C. No. 22 of 1965 on the file of the same Court.

But if the accused in this case had been acquitted after process had been issued to them, they would be entitled to plead *autrefois acquit*. It would be possible for close relations, as the complainant, and the accused in this case, to compromise or compound grave offences by following the procedure adopted in this case and plead *autrefois acquit* in a case regularly filed on a police charge-sheet and thus obstruct the administration of justice. It is on account of this grave concern about the purity of the administration of justice, I had to take up *suo motu* to *consider the validity* of the acquittal of the accused In C C No 3464 of 1965 on the file of the Sub-Magistrate, Sankari I am satisfied that the procedure adopted by the learned Sub-Magistrate is wholly irregular.

The complaint given by Chinna Goundan was in respect of an offence under section 307, Indian Penal Code, which could not be tried by the Sub-Magistrate, Sankari. The Sub-Magistrate could enquire into the complaint only as a P R C case It appears from the cause title given in the complaint as well as the petition filed by the complainant for the withdrawal of the case, that the case has been treated as a P.R C case But there is no entry in the P R C Register of the Court. There is an endorsement by the Magistrate on the first page of the complaint that the case was taken on file under section 323, Indian Penal Code It appears from the endorsement that it was made on the date of the complaint, 15th September, 1965. But there is no entry in the C C Register that any complaint was taken on file on 15th September, 1965. It appears from the C C Register that No 3464 of 1965 was taken on file only on 20th September, 1965, and was disposed of on the same date I have very grave doubts whether the case was taken on file under section 323, Indian Penal Code, on 15th September, 1965 The withdrawal petition could not have been filed on 20th September, 1965, with a cause title showing that it was a P R C case of 1965, if really the case had been treated as a C C case even on 15th September, 1965 The endorsement purported to have been made by the Sub-Magistrate on 15th September, 1965, is as follows —

> " Take the case on file under section 323, Indian Penal Code, whereas I am of opinion that it is necessary to ascertain the truth of the allegations in the complaint Issue of process to accused is postponed Post the complaint for enquiry to 24th September, 1965 "

The complaint in this case in so far as the serious charge under section 307, Indian Penal Code, is concerned, should be deemed to have been dismissed on 15th September, 1965, as the case was taken on file only under section 323, Indian Penal Code, there is nothing in Chapter XVI of the Code of Criminal Procedure to warrant the procedure adopted by the Sub-Magistrate in dismissing the complaint in so far as it related to the grave charge made in the complaint for the minor offence. In other words, section 202, Criminal Procedure Code, does not contemplate the Magistrate rejecting part of the complaint as not true and holding an enquiry about the truth of the remaining part of the complaint It is open to the Magistrate to issue process to the accused on the complaint and the sworn statement of the complainant but if he entertains any doubt about the truth of the complaint, it is open to him to postpone the issue of the process in order to hold an enquiry under section 202, Criminal Procedure Code. I have not come across any case in which

such an enquiry has been confined to part of a complaint, after the remaining part of the complaint has in effect been dismissed. A dismissal of the complaint can be made only under section 203, Criminal Procedure Code, and it would be inappropriate to dismiss the complaint even in part when the enquiry under section 202, Criminal Procedure Code, is still pending. But evidently the Sub-Magistrate wanted to clutch at the jurisdiction of trying the case by reducing the offence to be one under section 323, Indian Penal Code, and allowing the parties to compound the offence. Such a procedure is wholly irregular and it is strongly deprecated. It appears from the C.C. Register that the case was taken on file only on 20th September, 1965. Evidently on that date the endorsement dated 15th September, 1965, and the order of acquittal dated 20th September, 1965, have all been made. But even assuming that the endorsements dated 15th September, 1965, and the order of 20th September, 1965, were made on the respective dates and that the Registers of the Court had not been maintained properly, the procedure adopted by the learned Sub-Magistrate is totally illegal. According to the complainant, both the accused caught hold of him and threw him into the well saying that it would be better if he was done away with, and that he was rescued by the neighbours, who came on hearing his alarm. If these facts are true, the accused would be, clearly guilty of attempt to murder. It is true the complainant is alleged to have stated in the sworn statement that he know swimming. I am not sure whether the evidence has been recorded correctly as there was no necessity for him to mention that he knew swimming. But even if he knew swimming, it would not be sufficient to reduce the offence from one under section 307, Indian Penal Code to one under section 323, Indian Penal Code, unless the accused knew that the complainant knew swimming and they merely wanted to give him a ducking. But these are matters to be considered by the Sessions Court and not by the Committing Sub-Magistrate.

The learned Advocate for the accused referred to the decision in *D' Stephen* v. *Nosibella*[1], in support of his contention that the revisional jurisdiction conferred on the High Courts under section 439, Criminal Procedure Code, is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal and that it would be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. But it is clear from what I have stated that the order of the Sub-Magistrate acquitting the accused in P.R.C. case by clutching at jurisdiction by reducing the offence to one under section 323, Indian Penal Code, is manifestly illegal and requires to be corrected. In *Chinnaswami* v. *State of Andhra Pradesh*[2] the Supreme Court has pointed out that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal, but this jurisdiction should be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. It was pointed out in that decision that it was not possible to lay down the criteria for determining such exceptional cases which could cover all contingencies. In *Matukdhari Singh* v. *Janardan Prasad*,[3] it has been held that if the justice of the case clearly demands it, the High Court may set aside an order of acquittal and that a case of omission from the charge of a serious offence *prima facie* disclosed by evidence is one of those circumstances in which the power can properly be exercised particularly when the charge for the offence if framed, would have ousted the Court of trial of its own jurisdiction. If the case had been taken on file under section 307, Indian Penal Code, as it ought to have been done, on the facts alleged by the complainant and spoken to in his sworn statement, the Sub-Magistrate would have no jurisdiction to try the case, but only to held a preliminary enquiry. In *Raimen Ho* v. *State*[4] the complainant preferred a complaint to the police and the Magistrate against the two persons under section 324, Indian Penal Code. But the Magistrate took the case on file on the private

1. 1951 S.C.J. 269: A.I.R. 1951 S.C. 196: (Crl.) 140.
2. A.I.R. 1962 S.C. 1788.
3. (1966) 1 S.C.J. 225: (1966) M.L.J.
4. A.I.R. 1965 Orissa 6.

complaint under section 323, Indian Penal Code, and the police filed a charge-sheet under section 324, Indian Penal Code, and when both the cases came up for hearing, the complainant filed a petition before the Magistrate stating that he was withdrawing his case as the police had preferred a charge-sheet The order of the Magistrate acquitting the accused under section 248, Criminal Procedure Code, like the one in this case, was not legal or proper and the High Court in the exercise of its revisional jurisdiction *suo motu* set aside the order and substituted another order in the following words :

"Hence this case is merged with C R Case No 118 of 1961 which alone will be proceeded with hereafter"

Thus the jurisdiction of this Court to set aside the order of acquittal in C C No. 3464 of 1965 cannot be questioned. For the foregoing reasons, the order of acquittal is set aside.

The learned Advocate for the accused relied on the decision in *Raimen Ho* v. *State*[1], and contended that there should be a retrial of P R C No 22 of 1965 It should however be noted that the wrong acquittal of the accused under section 248, Criminal Procedure Code, in the case cited would operate as a bar to the trial of the accused in the case taken on file on the police charge-sheet till the acquittal was set aside and hence retrial of the case taken on file on the police charge-sheet was ordered But in the present case I have definitely found that the wrong order of acquittal of the accused in C C No. 3464 of 1965 on the file of the Sub-Magistrate, Sankari, cannot operate as a bar to the trial of the accused in the P R C case. There is therefore no need to order a retrial of the P R.C case But, as I am informed that the complainant alone has been examined in part, there could really be no objection to the retrial of the P R C case as prayed for by the learned Advocate for the accused, and in fact, it was not opposed by the learned Public Prosecutor. P R C No 22 of 1965 on the file of the Sub-Magistrate, Sankari, is ordered to be retried by the Sub-Magistrate

The learned Advocate for the accused relied on the Bench decision in *Perumal* v. *Chithanathan*[2], in support of his contention that there should be separate enquiries before the Sub-Magistrate on the police charge-sheet and on the private complaint of Chinna Goundan as the former enquiry has to be held under section 207-A, Criminal Procedure Code, while the latter under section 207, Criminal Procedure Code, though they are against the same accused and relate to the same transaction, and the trial of the cases could be combined in the Sessions Court as indicated in *Banwari* v *State of U P*[3] He also relied on the decision of the Supreme Court in *Chhadawilal Jain* v *State of Uttar Pradesh*[4] where it was pointed out that non-compliance with section 208, Criminal Procedure Code, in a case initiated on a private complaint would vitiate the commitment and could not be cured under section 537, Criminal Procedure Code But, in my view, it is really unnecessary to order an enquiry on the private complaint filed by Chinna Goundan before the Sub-Magistrate as complaint filed before the Police had been investigated by the police, who have filed a charge-sheet, and it forms the subject-matter of the P R C case. The learned Advocate for the complainant and the learned Public Prosecutor also stated that having regard to the facts of this case, it is not necessary to order any further enquiry on the private complaint filed by Chinna Goundan, though this Court might set aside the order of acquittal as wrong

For the foregoing reasons, Crl R C No 178 of 1966 is allowed and the acquittal of the accused in C C No 3464 of 1965, on the file of the Sub-Magistrate, Sankari, is set aside but no further enquiry is ordered in view of the pending enquiry on the police charge-sheet Crl.M P No 3247 of 1965 to quash the proceedings in P R.C. No 22 of 1965 on the file of the Sub-Magistrate, Sankari is dismissed but the enquiry shall be commenced afresh by the re-calling and re-examination of P.W. 1 from the commencement.

R.M —— *Revision allowed.*

1 A I R 1965 Orissa 6
2. 1965 M L J (Crl) 478.
3 (1962) M W N (Crl) 107
4 (1960) S.C J 801 (1960) M.L J. (Cr.) 620.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE T VENKATADRI.

Karur Taluk Ex.-Tappers Association by its Secretary M. S. Karuppanna Nadar .. *Appellant**

v.

Ramaswami Nadar and others .. *Respondents.*

Trade Unions Act (XVI of 1926), section 27 (2)—Scope of—Recovery of property of a dissolved trade union—If includes immovable properties also

The principle of section 27 (2) of the Indian Trade Unions Act dealing with the distribution of the property of a registered trade union will apply not only to movables but also to the immovable properties of the union When once it is established that a certain property was purchased out of the funds collected from the members of a trade union, it becomes in the nature of a trust property and it will not be open to any office-bearer or member to say that the union has no right to recover possession of the same Even when a trade union is dissolved and its members form themselves into another association and register themselves under the Societies Registration Act, the new society as a legal entity can recover possession of the properties of the earlier dissolved trade union It will not be open to the office-bearer of the dissolved union to resist the suit on the ground that the newly formed society has no *locus standi* to file the suit

Appeal against the Decree of the District Court, Tiruchirappalli dated 8th November, 1961, in Appeal Suit No 155 of 1961 preferred against the Decree of the Court of the Subordinate Judge of Tiruchirappalli dated 30th August, 1960, in Original Suit No 90 of 1959

S Amudachari, for Appellant

P. S Srisailam, for Respondents.

The Court delivered the following

JUDGMENT —This Appeal arises out of a suit filed by the appellant for recovery of possession of the plaint property and to call upon defendants 1 and 2 (respondents 1 and 2) to render a true and proper account of the Karur Taluk Ex-Tappers Association from 1942 till the date of suit, directing them to pay the amount that may be found due, and also for future profits from the suit property

The short facts that are necessary for the disposal of this Appeal are as follows. The plaintiff association has been duly registered under the Societies Registration Act Prior to the introduction of prohibition the aforesaid association was working under the name and style of Karur Taluk Tappers Union and it was registered under the Trade Unions Act of 1926 This Union had a membership of more than 2,000 members and respondents 1 and 2 herein, President and Treasurer respectively, were collecting subscriptions from the various members In the course of the management of the union, the property in question was purchased in the names of the 1st respondent and the Secretary and subsequently a terraced building was built on it The 1st respondent is occupying the main portion of this property and 2nd respondent is occupying another portion There are thatched houses in the property which are in the possesion of respondents 3 to 5 who are paying monthly rent to respondents 1 and 2. After the introduction of prohibition this Union became ineffective and there were no activities Therefore, the members were not taking any interest in the activities of the Union Taking advantage of this situation the 1st respondent continued to be in possession of the suit property It was for the first time that on 6th July, 1958, the Members of the Karur Taluk Ex-Tappers Association decided to recover the property from the first respondent and on that date under the auspices of the Karur Taluk Tappers Union a general body meeting was held wherein the association was re-named as Karur Taluk Ex-Tappers Association and office-bearers were elected on that date They passed a resolution authorising the Secretary to take steps for recovering the suit property. Hence the suit by the Secretary of the abovesaid Association.

The suit was resisted by the 1st respondent contending that the plaintiff association is not entitled to recover the suit property, nor can they call upon him to

*Second Appeal No. 1327 of 1962. 22nd June, 1966.

render a true account in respect of the income from the property which belonged only to the Karur Taluk Tappers Union, that the Karur Taluk Tappers Union was a distinct body altogether, that there was no meeting held an alleged in the plaint, that the property was not acquired with the funds of the Union or for the benefit of the Union, that the toddy contractors gave donations to him, with which he purchased the property for his own benefit, that taking advantage of the description and address of the 1st respondent in the sale deed and the incorrect averments made therein the present suit was filed, that he was not responsible for the maintenance of accounts nor for the monies of the Union, that the plaintiff had not been in possession within 12 years before suit and that the suit was barred by limitation The second respondent-second defendant filed a written statement to the effect that it is true that he was the Treasurer of the Tappers Union and that the amounts collected were deposited by the Secretary in the banks in the joint names of himself and the Secretary and that the 1st respondent the President was in possession of all the accounts In fact, he supported the case of the plaintiff Defendant 4 contends that he is a tenant and that he has no objection to surrender possession to whomsoever the Court directs Defendants 5 and 6 contend that they have vacated the property and they are not in possession and that they are not liable to pay any rent On these pleadings the parties went to trial The first Court has held that the plaintiff association has title to the property and that the plaintiff is entitled to sue Against the decision the 1st defendant preferred an appeal But here he did not press the defence regarding the title to the suit property. He contended that the suit was not maintainable He further contended that Karuppanna Nadar who styled himself as the Secretary of the Association has no *locus standi* to maintain the suit The Lower Appellate Court agreeing with these contentions dismissed the suit The result is that the first defendant-first respondent has no title to the property and the property belongs to the Tappers Union. The Lower Appellate Court is of the opinion that the plaintiff-appellant is not a successor-in-interest of the former Union and that the suit instituted on behalf of the appellant Association to recover possession of the suit property which belonged to the dissolved Union is incompetent Now, the plaintiff has preferred this Second Appeal.

The question that arises for my consideration is whether the present suit can be filed by the Secretary of the plaintiff Association As stated already, Karur Taluk Tappers Union was formed before prohibition was introduced in this State and the said Union was registered under the Trade Union Act of 1926 The plaint property was purchased under Exhibit A-1 dated 21st February, 1946, in the name of the first respondent in his capacity as President and in the name of Maruthamuthu Pillai the Secretary of the Union Only subsequently buildings were put up on this vacant piece of land It is now in the possession of the 1st defendant-1st respondent Therefore, it is clear that this property originally belonged to Tappers Union Now the question arises whether the plaintiff Association which was formed subsequently can recover this property The members of the former Union, in order to recover the plaint property, formed themselves into another Association and registered it under the Societies Registration Act and authorised the present Secretary to take steps for recovering the property For deciding the question whether the plaintiff can recover the suit property from the 1st respondent, a reference may be made to sub-section (2) of section 27 of the Indian Trade Union Act, 1926, which runs thus:

> "Where the dissolution of a registered Trade Union has been registered and the rules of the Trade Union do not provide for the distribution of funds of the Trade Union on dissolution, the Registrar shall divide the funds amongst the members in such manner as may be prescribed"

The principle to be followed as regards the distribution of funds by the Registrar is laid down in Regulation No 11 of the Central Trade Union Regulations, 1938 which provides

> "Where it is necessary for the Registrar under section 27 (2) to distribute the funds of a trade union which has been dissolved, he shall divide the funds in proportion to the amounts contributed by the members by way of subscription during their membership."

The learned District Judge is of opinion that this Regulation would not apply to the facts of the present case and that the Act does not deal with the immovable property that might have been acquired by the dissolved Union I am not able to agree with this decision rendered by the learned District Judge Even assuming that this original Union was dissolved, still the property does not cease to be the property of the Union Whatever it may be, the property is in the nature of a trust. The first defendant-first respondent was aware that the property did not belong to him The same was purchased from and out of the funds collected from the members of the Tappers Union He cannot contend that the original Union was dissolved and that therefore the present plaintiff cannot recover it Even according to the provisions of the Trade Unions Act this property should have been sold and the Registrar should have divided the proceeds to the members of the Union I am of the opinion that the principle under section 27 (2) of the Act would apply not only to movable properties but also to the immovable properties especially when these immovable properties were purchased from and out of the funds collected from the members of the Tappers Union In any event the members of the original Tappers Union formed themselves into another Association and registered it under the Societies Registration Act with the main object of recovering the property in question from the 1st respondent Now the present Union, *i e*, the plaintiff, is a legal entity entitled to take proceedings in order to recover the property from the 1st respondent. It is true that before the Association was registered the members convened a general body meeting for forming another Association and passed a resolution authorising the Secretary to take proceedings against the 1st respondent It is also true the resolution was passed on 6th July, 1958, and the Association was registered on 8th July, 1958 One of the contentions of the learned Counsel for the respondents is that the resolution was *ultra vires* and not binding on them since it was passed before the Association was registered But by the time the Association was registered Articles of Association and other things were formed and submitted to the Registrar Still learned Counsel for the respondents contends before me that even the present rule does not provide that the Secretary can file the suit I am of the opinion that all these contentions urged by the learned Counsel for the respondents are too technical and advanced only for the purpose of squatting on the property When once it is found that the property does not belong to the 1st defendant-1st respondent, he cannot be allowed to contened that the plaintiff has no *locus standi* to institute the suit Though at the time of the passing of the resolution the Society was not registered, when the suit was filed the Association was registered under the Societies Registration Act and the Secretary is competent to file the present suit and take proceedings to recover the property from the 1st defendant Under section 5 of the Societies Registration Act, the suit property should be deemed to be vested in the governing body of the said society and the property may be described as the property of the governing body of such society by their proper title, in all proceedings When once the Association was registered under the Societies Registration Act, the body has got a legal entity capable of suing in its corporate capacity The registration of the Association conferred on the plaintiff association a legal personality to take proceedings against the 1st defendant The present association is a collection of the members of the original Tappers Union and they have formed this Association with the object of recovering the property from the 1st defendant This is not a suit filed by some members of the Original Union against the other members of the Union This is a suit instituted by a newly formed association which has got a legal personality to recover the property from the 1st defendant, who is not a member of the new association After the dissolution of the Tappers Union, the property which is now in the possession of the 1st defendant, is a trust property and the members of the plaintiff association are entitled to trace the trust property and recover it from the person who is in unlawful possession of the same As far as the 1st defendant is concerned, he has no right to question whether the new Association has got title to the suit property or not When once it is clear that he has no title to the suit property and he himself concedes that he has no title to the property, it is his duty to hand over possession to a legally formed

association, i e, the plaintiff If any one of the members of the Ex-Tappers Association wants to protect the property he is entitled to do so by instituting proper proceedings against the present Association, but the 1st defendant has no *locus standi* to contend that the suit is not maintainable. I am of the opinion that the conclusion arrived at by the first Court is correct Therefore, I hold that the suit property is a trust property, that the 1st defendants is in unlawful possession of the same and that the plaintiff is entitled to recover the property from the 1st defendant.

In the result, the appeal is allowed The 1st defendant will pay Court-fee due to the Government and the 1st defendant will pay the costs of the plaintiff throughout. No leave.

R M. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT —MR. JUSTICE P. S. KAILASAM.

N. K. G Menon .. *Petitioner**

v.

The Superintending Engineer, Vellore Electricity System, Katpadi Extension-10 and another .. *Respondents.*

Madras Civil Service (Classification, Control and Appeal) Rules—Rule 17—Scope of—Failure to give an opportunity to the Government servant concerned to examine his witnesses after the examination of the prosecution witnesses—Effect on enquiry—Failure to give the names of witnesses in the questionnaire form initially submitted—If a ground for refusing permission to examine them

Rule 17 of the Madras Civil Service (Classification, Control and Appeal) Rules provides that the ground on which it is proposed to take action against a Government servant shall be reduced to the form of a definite charge or charges and shall be communicated to the person charged and he shall be given a resonable time to put in a written statement and the procedure for holding an oral enquiry if one is so desired by the person charged At the oral enquiry evidence shall be heard and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the enquiry may, for special reasons to be recorded in writing, refuse to call a witness The rules do not provide that if the names of the defence witnesses are not mentioned in the questionnaire form initially submitted by the person charged, he shall not have an opportunity to call defense witnesses On the other hand a reading of rule 17 makes it clear that after the examination of the prosecution witnesses and their cross-examination, the delinquent is entitled to give evidence himself and have defence witnesses called

Petition under Article 223 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to Memo. No 3955/O/62-9 dated 1st August, 1963 on the file of the Chief Distribution Engineer, Madras rejecting the petitioner's appeal and confirming the order of the Superintending Engineer, Vellore Electricity System made in Memo No. SEV/Adm. (3) 1435/62 dated 26th December, 1962, and quash the same.

K. K. Venugopal, for Petitioner.

M. S. Umapathy, for Respondents.

The Court made the following

ORDER —The petitioner joined service as a Linesman in the Pykkara Electricity System of the Electricity Department of the State of Madras He was promoted as Assistant Construction Foreman in 1952 and was appointed as Construction Foreman in 1954 After the passing of the Electricity (Supply) Act, 1949, the petitioner was transferred to the State Electricity Board in 1958 Under section 79 (c) of the Act, the Board is authorised to pass such rules and regulations regarding the conditions of service of its employees The Board, in pursuance of this power, passed a resolution by which it is provided that the Civil Services (Classification, Control and Appeal) Rules shall be made applicable to all its employees

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*Writ Petition No. 2058 of 1964. 11th July, 1966.

The petitioner was serving as Construction Foreman in Wandiwash Construction Sub-division On 24th June, 1961 it is the case of the Electricity Board that the petitioner was entrusted with two concrete poles for transportation to the spot where it had to be erected and he was also asked to inspect a conductor at a village called Manganallur. It is further alleged that instead of the petitioner transporting the two poles he entrusted the work to one Ponnuswami. The said Ponnuswami along with the other workers loaded the two poles in a cart, and while transporting the two poles, Ponnuswami fell under the wheels, was run over and killed An oral enquiry was conducted by the Divisional Engineer (Construction), Tiruvannamalai, on the same date Two charges were framed against the petitioner on 27th November, 1961 The petitioner was charged with slackness, indifference and irresponsible conduct in transporting the two poles and that by the slackness and inefficiency caused the death of Ponnuswami The petitioner submitted his explanation which was found unsatisfactory, he submitted another explanation on 11th December, 1961 An oral enquiry was conducted by the Divisional Engineer on 5th March, 1962, and two witnesses Varadan and Elumalai were examined and a show cause notice was issued by the Superintending Engineer on 30th August, 1962, finding the petitioner guilty of both the charges asking him to show cause why he should not be removed from service On receipt of the explanation, the petitioner was removed from service on 26th December, 1962 An appeal by the petitioner was also dismissed

In this writ petition Mr K K Venugopal, the learned Counsel for the petitioner, contended that the order of removal of the petitioner is unsustainable for the following reasons.

Firstly, the order of removal cannot be sustained as the finding of the enquiry officer is based on no evidence and the finding is perverse. Secondly it was contended that the enquiry officer placed reliance on the evidence of two witnesses Varadan and Elumalai who were examined by him at the preliminary enquiry on 24th June, 1961, withoutmaking their prior statements available to the petitioner. Thirdly it was contended that the enquiry was vitiated in that the prior statements of witnesses examined were not made available to him Fourthly, it was contended that the charges framed were vague and lacking in particulars Lastly it was contended that the order of removal is vitiated as the enquiry officer refused to examine defence witnesses after the prosecution closed its case, on the ground that the petitioner failed to disclose the names of his witness in the form of questionnaire which was submitted to the enquiry officer.

As I am accepting the contention of the learned Counsel for the petitioner regarding ground No 5, I am not dealing with the ground Nos 1 to 4 raised by the learned Counsel The enquiry was posted to 5th March, 1962 at 9 A.M At 9 A M. when the petitioner was called for the enquiry, he was absent He came to the enquiry only at 9-30 A M and presented a petition praying for an adjournment of the enquiry. In the petition for adjournment the petitioner stated that though he was entitled to have copies of statements given by the witnesses proposed to be examined he was not furnished with them and further he was not permitted to examine any witnesses on his behalf In view of the above, the petitioner stated that he was unable to prepare his defence and requested that the enquiry might be adjourned What happened subsequent to the presentation of the petition is found in the report of the enquiry officer. The enquiry officer was of the view that what the petitioner had stated in his petition for adjournment was not wholly correct. According to the enquiry officer, the questionnaire form was sent to the petitioner and in the questionnaire from the petitioner had not mentioned any witnesses to be examined on his behalf, and as there was no specific mention of the names of witnesses, it has to be taken that the petitioner had no witnesses to examine. The petitioner was questioned by the enquiry officer as to why he did not mention the names of witnesses on receipts of the enquiry memo The petitioner stated that he did not think of it before. After rejecting the petition for adjournment the enquiry officer proceeded to examine the two witnesses Varadan and Elumalai. It is unnecessary to deal

with the contention of the learned Counsel regarding the examination of Varadan and Elumalai without making available their earlier statements to him After the examination of the two witnesses, the enquiry officer went on to prepare his report It is admitted that the petitioner was not given an opportunity to call his witnesses after the conclusion of the evidence for the prosecution In the counter-affidavit it is stated that the petitioner did not name any witnesses in the questionnaire form supplied to him along with the charge-sheet and that it was not necessary to examine all persons who were transporting the poles on the date of the occurrence The allegation in the affiadvit in paragraph 9-E that the petitioner was not given an opportunity to examine defence witnesses has not been rebutted in the counter-affidavit

Rule 17 of the Madras Civil Services (Classification Control and Appeal) Rules provides that the grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges which shall be communicated to the person charged, together with a statement of the allegation on which each charge is based and the delinquent shall be required within a reasonable time to put in a written statement of his defence and to state whether he desires an oral enquiry or only to be heard in person An oral enquiry shall be held if such an enquiry is desired by the person charged or is directed by the authority concerned At the oral enquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses, called, as he may wish, provided that the officer conducting the enquiry may, for special and sufficient reasons to be recorded in writing, refuse to call a witness The rules do not provide that if the names of the defence witnesses are not mentioned in the questionnaire form submitted by the petitioner, he shall not have an opportunity, to call defence witnesses On the other hand, a reading of rule 17 makes it clear that after the examination of the prosecution witnesses and their cross-examination, the delinquent is entitled to give evidence in person and to have defence witnesses called Admittedly on the date of the enquiry, the petitioner asked for an adjournment complaining that he was not being permitted to examine defence witnesses on his behalf The enquiry officer ought to have given the petitioner an opportunity to give a list of witnesses after the conclusion of the examination of the prosecution witnesses and to have them examined On the materials on record, I have no hesitation in coming to the conclusion that the petitioner was not given a reasonable opportunity to rebut the charges framed against him On this ground alone the writ petition is allowed and the order of removal from service is set aside The department is at liberty to conduct the enquiry afresh according to law There will be no order as to costs

R M ——— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE R. SADASIVAM

S S M Subramaniam Chettiar and two others .. *Petitioners**

Evidence Act (I of 1872), section 124—Communication in official confidence—Privilege as regards—Scope of—Evidence recorded by an officer holding an enquiry under Police Standing Order 145—When privileged

The object of a departmental enquiry under Police Standing Order 145 against a Police Official is no doubt different from an enquiry under section 176 of the Criminal Procedure Code in respect of charges of criminal offence alleged to have been committed by the official even though the enquiry into the conduct of a Police Official and the investigation of the charge of criminal offence might arise out of one and the same occurrence An enquiry under Police Standing Order 145 is not a judicial one and is in the nature of an executive instruction to implement an enquiry under section 176 of the Criminal Procedure Code, Police Standing Order 145 has not the force of law It is not issued under any statutory authority Hence whether, or not a party against whom an enquiry is held under Police Standing Order 145 would be entitled to copies of documents in such enquiry would depend on the facts and circumstances of each case Where the enquiry is really one under section 176 of the Code, copies of deposition of witnesses taken in such enquiry should be furnished to the accused in a prosecution in respect of one and the same offence arising out of the same occurrence

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* Crl R.C No 658 of 1966 and Cr R.P. No 651 of 1966 26th July, 1966.

Section 124 of the Evidence Act no doubt protects disclosure of statements made by public officers in official confidence The protection extends not only to communications by one official to another but also to communications made by private persons to a public officer in official confidence.

Hence before the privilege under section 124 of the Evidence Act could be claimed in respect of statements made by persons in an enquiry under P S O 145 the nature of the enquiry should first be determined and the statement of every witness considered individually to find out whether they were made in official confidence

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the common Order dated 25th April, 1966, and made in Copy Applications Nos 11 and 16 of 1966 in P R C No 9 of 1965 on the file of the Special District Magistrate, Coimbatore

Govind Swaminathan for *N. Sivashanmugham*, for Petitioner.

The Public Prosecutor, on behalf of the State.

The Court made the following

ORDER.—Petition by accused 1 to 3 in P R C No. 9 of 1965, on the file of the Special District Magistrate, Coimbatore, to revise the order of the said Magistrate rejecting their applications for grant of copies of statements of witnesses examined before the District Revenue Officer, Salem.

Petitioners are being proceeded against for charges of rioting, criminal trespass, mischief, attempt to murder etc , alleged to have been committed by them during the Anti-Hindi agitation on 10th February, 1965 at Komarapalayam. There was an enquiry by the District Revenue Officer in respect of the Anti-Hindi agitation and rioting on 10th February, 1965, and statements of the witnesses were recorded by him The learned Public Prosecutor raised some doubt, whether the said enquiry was under P S O 145 corresponding to the old P S O 157 But it is clear from the prior order of the Special District Magistrate, which came up in revision before me, that the contention of the Special Public Prosecutor was that the enquiry made by the D R O. was one under P S O 145 The D R O filed an affidavit that it was not a judicial or a quasi-judicial enquiry, that the enquiry was not conducted under any statute and that the enquiry was only a fact finding enquiry ordered under the executive instructions of the Government with the object of ascertaining whether the opening of fire by the police was justifiable or not Originally, privilege was claimed under section 123 of the Indian Evidence Act on the strength of the affidavit of the D R.O. and it was upheld by the Special District Magistrate In Criminal Revision Case No 52 of 1966, I set aside the order on the ground that the privilege should be claimed by the Head of the Department, as held by the Supreme Court in *State of Punjab* v *S S Singh*[1]. But, when the matter went back before the Special District Magistrate, the privilege under section 123 was not pressed, but privilege was claimed under section 124 of the Evidence Act.

The copy applications filed by the petitioners were not only in respect of prior statements recorded in the enquiry under P S O 145 of persons who were to be examined as witnesses in the P R C case, but also of reports made by the D R O. But the reports are confidential communications by the D R O to the Government and the privilege claimed in respect of the same cannot be and was not disputed. Hence the only question to be considered in this petition is whether there could be any privilege in respect of the statements of witnesses recorded by the D R O.

The object of the enquiry under P S O 145 is no doubt different from the object of the investigation of the charges against the petitioners for criminal offences alleged to have been committed by them It is true that the enquiry under P S O 145 against the conduct of Police Officials, and the investigation of the case against the petitioners, are in respect of the same occurrence, namely, the rioting which took place on 10th February, 1965, at Komarapalayam There is conflict of judicial opinion as to the nature of the enquiry under P S O 145 In In re, *Veerappan*[2], it was held by Kuppuswami Ayyar, J., that where a Sub-Divisional Magistrate holds an enquiry and examines a large number of witnesses on oath and passes an order

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1 (1961) 2 S C J 691 (1961) 2 M L J - M L J (Crl) 731 A I R 1961 S C 493 (S C) 203 (1961) 2 An W R (S.C) 203 (1961) 2 (1943) 2 M L J 182

under P S O 157 (corresponding to the present P S O 145), there is a judicial enquiry by the Sub-Divisional Magistrate, as defined in section 4 (*m*) of the Code of Criminal Procedure, and therefore, the order is one revisable under section 435, Criminal Procedure Code, and that it cannot be said that the enquiry by the Magistrate under P S O 157 is only a departmental one against which no revision lay. But in *Rajangam* v *State of Madras*[1], it was held that the view of Kuppuswami Ayyar, J , in the above decision as to the right of this Court to interfere in revision in respect of proceedings under P S O 157 is not correct as the Magistrate holding the enquiry under P S O 157, though exercising the powers under section 176, Criminal Procedure Code, is not acting as a Court It was held in that decision that the enquiry under P S O 157 which is in the nature of executive instructions to implement the enquiry under section 176, Criminal Procedure Code is only a fact finding enquiry. In *State of Andhra Pradesh* v *Venugopal*[2]. It was held that P S O. 145 has not the force of law as it was not issued under any statutory authority, but is only an executive instruction and that non-compliance with the same would not render the investigation of a case illegal But if the enquiry is really one under section 176 Criminal Procedure Code, copies of depositions of witnesses taken in such an enquiry should be furnished to the accused as held in In re, *Venkataramana Rao*[3]. The fact that the enquiry under P S O. 145 is not a statutory enquiry would not then really affect the question. It could not however be said that every enquiry under P S O 145 is in respect of an enquiry under section 176, Criminal Procedure Code, which relates only to cases of suspicious death The question whether a party would be entitled to copies of documents in the enquiry under P S O. 145 would, therefore, depend on the facts and circumstances of each case.

Mr. S Govind Swaminathan, appearing for the petitioners, relied on the decision in *State of A P* v. *Appanna*[4], in support of his contention that the words " Official confidence " in section 124 of the Evidence Act indicates that the section applies to communications from one public officer to another public officer in the discharge of their official duties, and not communications to such officers by outsiders It is true two decisions of our High Court are referred to in support of this view In *Nagaraja Pillai* v *Secretary of State*[5], a Bench of this Court held that the object of section 124 of the Evidence Act was to prevent disclosures to the detriment of public interests and that the decision as to such detriment rested with the officer to whom the communication was made and did not depend on the special use of the word ' confidential ' In referring to the words ' communications in official confidence ', Oldfield, J , observed that they import no special degree or secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another in performance of their duties It should be noted that the case related to the production of a report by a Supervisor to the Sub-Divisional officer The decision in *Venkatesam Naidu* v *State of Madras*[6], also related to inter-departmental correspondence between the officers of departments of Government and it was held that the Government could not be compelled to produce them when it claimed privilege Section 124 of the Evidence Act merely refers to privilege in respect of communications made to a public officer in official confidence, and there is nothing in the section to restrict the scope of the section to communications by public officers It is not possible to infer from the words " official confidence " that section 124 is intended to protect only communications by one official to another. There may be cases in which a private person may make a communication to a public officer in official confidence and it could not be said that the public officer cannot claim privilege in respect of the same. There are several cases in which such claims in respect of communications by private persons to public officials have been upheld under section 124 of the Evidence Act Thus in In re, *Suryanarayana Naidu*[7], the privilege claimed was in respect of statements made by the defendant

1 (1959) 1 M L J 71: (1959) M L J (Crl) 71

2 (1965) 2 M L J (S C) 87 (1965) 2 S C.J. 507. (1965) 2 An W R (S C) 87 : 1965 M L J. (Crl) 749 : A I R 1964 S C 33

3 (1944) 2 M L J 292 . 1944 M W N Cr 158

4 (1962) M L J (Crl) 280 (1962) 1 An.W.R. 256

5 I L R 39 Mad 304.

6 (1959) 1 M L J 288

7 (1954) 66 L.W 927.

in the suit to the Taluk Supply Officer and it was held that the communications sought to be disclosed were of the nature covered by section 124 of the Evidence Act and the privilege claimed was upheld. I am, therefore, unable to accept the wide proposition put forward by the learned Advocate for the petitioners that as the statements were made by the witnesses, who are private persons, to the D.R.O. they cannot come within the ambit of section 124 of the Evidence Act

The learned Public Prosecutor urged that as the enquiry under P S O 145 is of a confidential nature, privilege can be claimed under section 124 of the Evidence Act in respect of every statement made by every witness in such an enquiry I am unable to accept even this wide proposition of the learned Public Prosecutor. I have already pointed out that the nature of the enquiry under P S O 145 should first be determined and ther the statement of every witness considered individually to find out whether they were made in Official confidence In *State of Punjab* v. *Sukhdev Singh*[1], Gajendragadkar, J , has pointed out as to how the privilege should be claimed in respect of each document It is pointed out in that decision that the affidavit claiming privilege should show that each document in question had been carefully read and considered and the person making the affidavit was satisfied that its disclosure would lead to the public injury and that if there are series of documents included in a file, it should appear from the affidavit that each one of the documents, whose disclosure is objected to, had been duly considered by the authority concerned and that the affidavit should also indicate, briefly, within permissible limits, the reason why it was apprehended that their disclosure would lead to injury to public interest

In the present case, the statements made by the witnesses are in respect of an occurrence which took place on 10th February, 1965, at Komarapalayam It is clear from the records in this case that the enquiry was held in open and witnesses were examined in the presence of others In fact, the petitioners were permitted to inspect the statements, and they were actually furnished with a copy of the statement of one of the witnesses I gave time to the learned Public Prosecutor to go through the statements given by the witnesses before the D R O and the learned Public Prosecutor was not able to point out any such statement in the recorded statements of any of the witnesses Having regard to the above facts there could be no question of privilege under section 124 of the Evidence Act in respect of the statements made by witnesses to the D R O in respect of the occurrence on 10th February, 1965, at Komarapalayam, which also forms the subject-matter of enquiry in the case against the petitioners. In practice copies of statements of witnesses in the enquiry under P S O 145 are furnished to accused charged with offences arising out of the occurrence which formed the subject of the earlier enquiry It is true the scope of the enquiry under P S O 145 is different from the sope of the enquiry against the petitioners, and hence there may be difference in the manner of recording of statements of the same persons in the two enquiries, but this is a matter which need be considered only when the statements are actually used and their relevancy or reliability comes into question.

For the foregoing reasons, the order of the learned Special District Magistrat e is set aside and he is directed to furnish copies of the former statements of such of the witnesses enquired before the D R O as the prosecution wants to examine in the enquiry against the petitioners.

R.M. *Revision allowed; directions given.*

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1. (1961) M L.J. (Crl) 731 at 740 (1961) 2 S.C.J. 691: (1961) 2 M.L J (S.C.) 203: (1961) 2 An W R. (S.C.) 203.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE P. KUNHAMED KUTTI.

The Madras Piece-goods Merchants Charitable Trust by its Secretary V. S. Devanathan .. *Plaintiff**

v.

Moolchand Gupta and another .. *Defendants.*

Madras Buildings Lease and Rent Control Act (XVIII of 1960), sections 2 (8), 10 (1) and 30—Tenant—Person in possession under a compromise decree agreeing to hand over possession—If entitled to protection under Act—Amount paid—If rent—Amendment of section 30 of Act by Act II of 1964—Effect.

Words and Phrases—Rent—What is.

The use of the word 'rent' is not conclusive of the matter that the relationship of land lord and tenant is created between the owner and occupier and it cannot preclude the landlord from contending that in spite of such payment there is no relationship of landlord and tenant under the Rent Control Legislation. The question must depend upon whether or not there is a transfer of interest by the landlord in favour of the tenant.

It is no doubt true that under section 10 (1) of the Act a person in possession, if he is a tenant cannot be evicted even in execution of a decree and it makes no difference in principle whether the decree is one passed after contest or under a compromise or whether it is one passed before the Act or after the Act, so long as the Rent Control Legislation applied to such a tenancy.

Hence persons who continue in occupation of a building even after a decree for possession is made against them, can take advantage of the amendment of section 30 of the Rent Control Act by Act XI of 1964 and claim protection under section 10 of the Act. But where after the passing of such a decree there has been a surrender of a part of the holding by the tenant or his sub-tenant on his behalf, in pursuance of the decree and there had been a disruption of the entire holding, such a person cannot be deemed to be continuing in possession after the termination of the tenancy in his favour and he cannot be deemed to be a statutory tenant under section 2 (8) of the Act.

Application in proceedings for execution of decree in C.S. No. 163 of 1962 in the Ordinary Original Civil Jurisdiction of the Madras High Court.

P. V. Subramaniam, for Applicant.

V. K. Thiruvenkatachari, T. T. Srinivasan and *A. N. Rangaswamy*, for Respondents.

The Court made the following

ORDER.—The Applicant Moolchand Gupta, against whom a decree was passed on compromise and execution has been taken out for vacant possession, prays by the present application to dismiss the said E.P. and recall the warrant for delivery of possession.

The Suit C.S. No. 163 of 1962, by the plaintiff-respondent was for vacant possession of door Nos. 184-186, China Bazaar Road, George Town and the compromise decree directed the applicant to quit the portion in his occupation of the aforesaid premises on or before 31st January, 1964, subject to the condition that the plaintiff would be entitled to take possession of the portion in the occupation of Panachand and the Bullion Market Post Office immediately by executing the decree. For the purpose of the present application, we are not concerned with the rest of the terms of the compromise.

After the aforesaid E.P. Panachand delivered possession of his portion to the plaintiff by attornment and as regards the portion occupied by the Bullion Market Post Office, an order has been passed under sub-section (2) of section 3 of the Rent Control Act XXX of 1952, and therefore, the relief prayed in E.P. No. 35 of 1964 was limited against the judgment-debtor-applicant in respect of the portion in his occupation. Meanwhile, Act XI of 1964 which had the effect of abating certain pending proceedings as a result of certain amendment to the Madras Buildings (Lease and Rent Control) Act, 1960, had come into force and it omitted clause (3) of section 30 of 1960 Act with consequential other amendments, so that the restriction as to the operation of the latter Act on the basis of rent was removed and non-residential buildings paying more than Rs. 400 also came within the purview of the Act.

* C.S. No. 163 of 1962 (A. No. 2443 of 1964 in E.P. No. 35 of 1964). 5th August, 1966.

In 1963, one Raval & Co had filed a Writ Petition questioning the constitutional competence of certain proceedings against them before the Rent Controller. When the present application was filed by the applicant, this Writ Petition was pending, and by an order on a reference by Srinivasan, J, the above said petition and the present application which also raised substantially the same question, were posted before a Full Bench The learned Officiating Chief Justice, as he then was, who delivered the judgment in this reference, while dealing with the point urged by the learned Counsel for the applicant stated *inter alia* that the wording of section 3 of Act XI of 1964 can by no means be described as happy or free from any cloud or ambiguity The learned Chief Justice observed

"It is not very clear how a proceeding could have been instituted on the ground that such building or part was exempt from the provisions of the Principal Act by virtue of clause (iii) of section 30, or what is the precise scope of the rights and privileges which may accrue to the landlord, and which are to cease and determine."

But on the question whether the section had to be struck down either on the ground that it infringed Article 14 of the Constitution or upon any other patent ground of *ultra vires*, the learned Chief Justice held that its applicability to the stated facts of C S. No 163 of 1962 is a matter outside the scope of the reference before the Bench On the constitutional validity of the Amending Act XI of 1964, it appears to have been argued that the provisions of Act XVIII of 1960 are themselves violative of Article 19 and equally so, Act XI of 1964 These contentions also were not upheld by the Full Bench as in the view expressed by the learned Chief Justice, they represented a valid exercise of the legislative power of the State and the restrictions imposed by the Acts on the fundamental rights guaranteed to the landowner by Article 19 (1) (*f*) were reasonable

He observed:

"Indeed, we think it would be almost impossible to sustain any doctrine of the inviolability of contractual rights, in the context of the welfare legislation, which has become so marked a characteristic of modern times It is difficult to see how, if a legislature could enact that an exorbitant rate of interest could be struck down by a Court and the debtor relieved against this, notwithstanding the terms of a contract, it cannot validly enact that both a landlord and tenant may apply for the determination of fair rent for premises, though the contract may be subsisting The same remarks would be applicable to many other restrictions upon property, imposed in numerous fields of human activity, which have been held to be reasonable "

The answer given to the reference by the Full Bench was:

"The Madras Rent Control Acts, viewed, from any perspective, such as that of legislative competence, legislative intendment or the plain significance of the structure of the enactments, admits only of one interpretation, they interfere both with contractual and statutory tenancies, by affording a special protection to tenants against eviction, and also balancing this by certain corresponding obligations imposed on tenants . . "

Therefore, Act XVIII of 1960 including Act XI of 1964 are within the competence of the Legislature and validly passed, that none of them is liable to be struck down either on the ground of hostile discrimination under Article 14 or on the ground that there has been an unreasonable restrictions of fundamental right guaranteed under Article 19 (1) (*f*) of the Constitution Application has now been posted and argued before me for a final disposal, the prayer therein being for dismissal of E.P. No. 35 for vacant possession of the property in the possession of the applicant.

The basic contention of the applicant is that having regard to the definition of a 'tenant' in Act XVIII of 1960, he is not liable to be evicted or possession recovered from him even in view of the Amending Act XI of 1964, though a compromise decree has been passed against him "Tenant" as defined in Act XVIII of 1960 means any person by whom and on whose account rent is payable for a building and includes the surviving spouse, or any son, or daughter, or the legal representative of the deceased tenant who had been living with the tenant in the building as a member of the tenant's family upto the death of the tenant and a person continuing in possession after the termination of the tenancy in his favour but does not include a person placed in occupation of a building by its tenant or a person to whom the collection of rents or fees in a public market, cart-stand or slaughter house or of rent for shops has been farmed out or leased by a Municipal Council or the District

Board or the Corporation of Madras. ' Rent ' has not been defined in the Act and the use of this word is not conclusive of the matter that relation of landlord and tenant is created between the owner and occupier. In the legal sense, it may be used as recompense paid by the tenant to the landlord for the exclusive possession of the premises occupied by him , it may also be used in the generic sense without importing the legal significance aforesaid of compensation for the use and occupation. ' Rent ' in the legal sense can only be reserved on a demise of immovable property Hence the use of the term ' rent ' cannot preclude the landlord from pleading that there is no relationship of landlord and tenant The question must depend upon whether or not there is a relationship of landlord and tenant in the sense that there is a transfer of interest by the landlord in favour of the tenant vide *H S Rikhy* v. *The New Delhi Municipality*[1] The question, therefore, is not so much whether the compensation paid by the person in occupation is termed ' rent ' as whether the relationship of a landlord and tenant as construed by Courts *vis-a-vis* the Lease and Rent Control Legislation

Sri Thiruvenkatachari for the respondent emphasised that what is payable by the applicant subsequent to the decree cannot be characterised as ' rent ' but has to be construed as mesne profits defined in the Civil Procedure Code—section 2 (12)—as " profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits ". This circumstance again is not conclusive for the reason that if the applicant by reason of the aforesaid legislation can be deemed to be a statutory tenant, what is payable by him as mesne profits has, for that reason to be also construed as ' rent ';

A tenant in Act XVIII of 1960 is not liable to be evicted under section 10 of the Act whether in execution of a decree or otherwise except in accordance with the provisions of the said section or sections 14 to 16 which deal with recovery of possession by landlord for repairs or reconstruction, the tenant's right and the conditions under which he could reoccupy after repairs and his right to occupy the building if it is not demolished. It is not urged before me that the landlord in the present case, was entitled to enforce against the applicant any of the grounds set out in sub-section (2) of section 10 The argument is that C.S. No 163 having been compromised and that what had been claimed from the applicant on the date of the suit as arrears and for the subsequent period was mesne profits and not rent, this is a case which is outside the scope of the provisions of the Rent Control Act The defintition of the ' tenant ' in the Act already set out by me read with section 10 (1) of the Act which specified that a tenant shall not be evicted whether in execution of a decree or otherwise does not seem to justify this contention In *Sanjeeva Naidu* v. *Chittibabu Mudaliar*[2], a person coming into possession under a lease had set up title in himself as owner and the landlord on that ground had obtained a decree for ejectment Rajamannar, C.J., speaking for the Bench held in the above case that the person in possession cannot be evicted in execution of the aforesaid decree as the defendant would be a tenant holding over entitled to rely on the provisions of the Madras Buildings (Lease and Rent Control) Act, 1949 except in accordance with the provisions of section 7 (1) of the Act which is now identical with section 10 of Act XVIII of 1960 I may mention here that the definition of ' tenant ' under the aforesaid Act is also identical. The learned Chief Justice referred to the general law in section 111 of the Transfer of Property Act and held that the tenancy in favour of Chittibabu had been duly terminated , but he would still be a ' tenant ' under the Rent Control Act who had continued in possession after the termination of the tenancy and must, therefore, be deemed to have continued in possession as a tenant ; in other words, he would be a tenant holding over and under the general law, a tenant holding over is governed by the terms of the tenancy under which he came into occupation The learned Chief Justice further pointed out that under section 7 (1), a person in possession of a building shall not be evicted therefrom whether

1 (1962) 1 S.C J 612 : A.I R. 1962 S C 554.
2. (1953) 1 M L J 260

before or after the termination of the tenancy whether in execution of a decree or otherwise except in accordance with the provisions of that section and this provision is a complete answer to the execution petition filed by Sanjeevi for eviction.

A similar view was taken by the learned Chief Justice sitting with Ganapathia Pillai, J., in *Thalaivadivu Anandar* v. *Venugoapala Chettiar*[1] That was a case which had come up in Letters Patent Appeal against the order of this Court in A.A.A.O. No. 130 of 1954 arising from an execution petition in the Munsif's Court, Thiruchirapalli. The view expressed by the learned Chief Justice in this case is that it is not correct to say that section 7 of the Madras Buildings (Lease and Rent Control) Act would apply only to cases of decrees in ejectment passed after the coming into force of the Act. The section prohibits eviction of tenants in execution of decrees whether the same is made before or after the Act and whether the decree is based on a compromise or after contest. Where an execution petition is filed after the coming into force of the Act, the tenant could invoke the protection under section 7 It appears to have been argued before the learned Judges that section 7 would apply only to a decree passed in suits after the passing of the Act. This contention was not upheld by the learned Chief Justice, nor was he inclined to hold that the principle against the retrospective operation was offended in the case He observed

"It is not as if during the pendency of E.P. No. 240 of 1954, out of which this appeal arises, that the Rent Control Act came to be extended to the suit village By the date of the filing of the present execution petition that Act had come into force The executing Court which was bound to apply the provisions in the statute, which had come into force even before the date of the execution petition which it was called upon to dispose of In our opinion, there is no substance in the contention of the learned Counsel for the appellant"

Then, dealing with the argument that section 7 would not apply to compromise decrees, the learned Chief Justice pointed out:

"Once a decree is passed, we can see no difference on principle between a decree passed on a compromise and a decree passed after contest"

For the respondent, Sri Chari would urge that the definition of 'tenant' in section 2 (8) of the 1960 Act, second part, means a tenant continuing in possession under circumstances contemplated in section 116 which deals with the effect of holding over and that was the basis of the decision in *Sanjeeva Naidu's case*[2], and the principle laid down therein does not apply to a case, like the present, where the parties come to an agreement that the relationship shall not be that of landlord and tenant In this context, Sri Chari referred to the first amendment of section 30 by Act II of 1962 which had the effect of determining all rights and privileges which may have accrued to any landlord by virtue of clause (ii) or (iii) of section 30 of the Principal Act in so far as they relate to a building or part thereof which is not exempt under the aforesaid clauses and made them unenforceable Act XI of 1964 similarly determined the landlord's rights in respect of non-residential buildings and in consequence brought such buildings within the purview of Act XVIII of 1960. But the contention is that the compromise entered into in the present case between the applicant and the respondent had come into force long before this Act, that a consent decree had been passed on such compromise, and therefore the applicant having ceased to be a tenant from that moment the subsequent Amending Act of 1964 cannot have the effect of restoring the relationship and that the transition from a common law tenant to a statutory tenant cannot be taken advantage of by the applicant when actually there was no relationship of landlord and tenant. Sri Chari also drew my attention to the language of section 3 of Act XI of 1964 and emphasized the words 'proceedings. . . . . pending' and 'instituted' and urged that what was intended by the amendment was that if proceedings in respect of any non-residential building was pending or instituted, they were to abate and in the present case, there was no such proceeding as the matter had already been surrendered as per the said compromise The applicant was, according to him, therefore, in the position of a permissive occupant and not a tenant holding

1 (1950) 1 M.L.J. 356. 2 (1953) 1 M.L.J. 260

over. But in the case on hand, there was not only a decree by consent for eviction which would normally put an end to the tenancy and the relationship arising out of it; but the provisions of section 3 of Act II being vague and meaningless, the same cannot apply in any event to cases after the decree. Sri Chari would thus make a distinction between cases which are pending and cases which have proceeded to decrees This, however, is not possible to my mind if we read section 10 (1) and section 19 together and as a result of Act XI of 1964, the limit on the basis of rent has been removed in respect of non-residential buildings The question then arises whether Act XI of 1964 could be given retrospective effect. A Full Bench of the Punjab High Court held in *Shamsunder* v *Ramdas*[1], that a statute, unless it be a statute dealing with procedure only, should not be construed as having retrospective effect unless the statute expressly makes its provisions retrospective or retrospective effect is given by necessary implication or intendment The case before the Full Bench came under Delhi and Ajmer-Merwara Rent Control Act, 1947 and the question for consideration was whether section 9 (1) of the Act is retrospective in its operation The Act prohibited all Courts from making any order evicting any tenant in execution of decree passed before or after that Act came into force. The learned Judges held that the expression 'makes any order in execution of a decree evicting any tenant', in section 9 (1) applies to the stage when execution of a decree for ejectment is sought by the decree holder and that the argument that in ejectment suits the order for eviction is made when the decree is passed and that no order of eviction is passed in execution proceedings does not receive support from what is contained in Order 7, rule 1, Order 20, rules 6 and 12, Order 21, rule 35, Form No 23 Appendix 6 and Form No. 11 Appendix E, Civil Procedure Code The learned Judges further held that as section 9 (1) expressly governs transactions occurring before or after the commencement of the Act, section 15 of the Act instead of preventing the application of section 9 (1) of the Act to the execution of decrees passed before the Act came into force is subject to the provisions of section 9 (1) of the Act.

In *Shyamalal* v *Umacharan*[2], a Full Bench of the Madhya Pradesh High Court, while emphasising that the protection afforded in sections 4 and 17 of the Madhya Pradesh Accommodation Control Act, is to a tenant, held that a person whose tenancy has been determined but who continues to remain in possession of the tenanted premises without the assent of the landlord after the determination of the tenancy is a tenant for the purposes of the Act and is entitled to the benefit of sections 4 and 17 of the Act The question before the Full Bench was whether in a suit pending on the date of the commencement of the Madhya Pradesh Accommodation Control Act, a decree for eviction can be passed except on one or more of the grounds mentioned in section 4 (2) of the Act, whether a decree for eviction obtained before 1st January, 1959, can be executed against a tenant so long as the Act is in force except on any of the grounds mentioned in section 4 and whether a person whose tenancy had come to an end before the commencement of the Act is a tenant for the purposes of the Act and can claim the protection given under the Act Shiv Dayal, J., in his opinion emphasised that the protection afforded in sections 4 and 17 is to a tenant He observed:

"In the strict legal sense of the term, a tenant is one whose tenancy subsists In common parlance, however, a tenant who continues to occupy a tenanted premises in spite of the determination of the lease, is also called a tenant It is then to be seen whether it was its strict meaning or popular meaning which was intended by the Legislature when they used the term 'tenant' in those sections Section 4 opens thus 'No suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds ' and in clauses (*a*) to (*n*) those exceptional grounds are enumerated There can be no doubt that section 4 is not an enabling provision in the sense that a tenant can be ejected even without determining the lease It is primarily a disabling provision, although in the circumstances provided in clauses (*a*) to (*n*) the protection given to the tenant is withdrawn To put it differently this section imposes a restriction on the right of the landlord to eject his tenant, over and above those provided in the Transfer of Property Act. The section does not confer any new benefit on the landlord, nor does it enlarge his rights under the Transfer of Property Act"

1. A.I.R. 1951 Punj. 52 (F.B.). 2. A.I.R. 1961 M P 49 (F.B.)

The learned Judge further observed.

"Section 17 further strengthens the interpretation of the word 'tenant' as to include ex-tenant. It reads thus.

'17. In all suits for eviction of tenants from any accommodation pending on the date of the commencement of the Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in section 4 of the Act'

The clear language of section 17 pre-supposes that in a suit which was pending on the day when the 1955 Act came into operation the lease must have been determined before the commencement of the Act, for the suit for eviction must have been brought after determining the lease If tenant means only a tenant, his tenancy is subsisting, it is difficult to see for whose benefit section 17 was enacted Retrospectively (sic) of section 17 makes it quite plain that its protections cannot be denied to a tenant whose lease was determined before the commencement of 1955 Act"

Section 10 of Act XVIII of 1960 goes a step further and prohibits eviction even in execution of a decree except in accordance with the provisions of the said section or sections 14 to 16 and, therefore, if matters rested there alone, I should have agreed with the contentions of the learned Counsel for the applicant that the decree obtained against him cannot be enforced since 'proceedings' referred to in section 3 of Act XI of 1964 can apply both to pre-decree and post-decree proceedings including proceedings in execution by reason of section 141, Civil Procedure Code It seems to me, however, that in the present case, subsequent to the passing of the decree which was on a compromise—and that circumstances, as I stated, cannot, on principle, make any difference—there had been a surrender of part of the holding by the applicant's sub-tenant which, as regards the applicant, must be deemed to be on his behalf and thus there was a disruption of the entire holding. In the circumstances, he cannot be deemed to be a person continuing in possession after the termination of the tenancy in his favour and thus a statutory tenant within the meaning of section 2 (8) of Madras Act XVIII of 1960. If he is not such a tenant and that appears to be the position even on the date of the decree as by the terms of the compromise the portion in the occupation of Panachand was agreed to be taken delivery of by the decree-holder-respondent and the rest of the portion was held by him on sufference agreeing to pay mesne-profits at Rs 1,340 per month for the period from 1st November, 1960 to 31st January, 1963 subject to his right to get credit for the amount already paid as per Court's order and future mesne-profits at Rs 800 per month from 1st February, 1963. he cannot get relief as a tenant In this view of the matter, the applicant is not entitled to rely on the 1964 Amendment of the Act when pursuant to the decree, Panachand's possession has already been recovered by the decree-holder In the circumstances, therefore, I am inclined to hold that the applicant is not entitled to the relief prayed for by him, namely, the dismissal of E.P. No. 35 of 1964.

This application is, accordingly dismissed with costs. The applicant is given three months' time to surrender the portion in his possession

R.M. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. VEERASAWMI.

Vadivelu Somban .. *Petitioner**

v.

Annadana Chatram by its sole trustee,
A Veerayya Vandayar, Poondi .. *Respondent*

Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act (LVII of 1961), *sections* 23, 24 *and* 29—*Application by tenant for fixation of fair rent—Duty of rent Court—Parties failing to place sufficient material—Rent Court if bound to collect necessary material and fix fair rent—Onus of proving fair rent.*

Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act (LVII of 1961), *sections* 29 (2), 32 *and* 58—*Powers of Court of revision to interfere in finding of fact—Order in revision under section* 32—*Revision petition against under section* 115 *of Civil Procedure Code—Competency.*

The argument that where a petition for fixation of fair rent under the Madras Public Trust (Regulation of Administration of Agricultural Lands) Act is made, a duty is cast on the Rent Court

* C.R.P No 1250 of 1965 5th November, 1965.

to fix the fair rent and that it cannot therefore dismiss the application on the ground that the evidence on the record is not sufficient to enable it to come to a conclusion, is untenable. The Act and the Rules framed thereunder do not cast any such duty on the Rent Court They do not contemplate that the duty of the Rent Court goes further than disposal of the applications for fair rent on the evidence placed before it No obligation is cast on the Rent Court that notwithstanding the parties not placing before it proper material to enable it to fix fair rent, it should *suo motu* make all possible efforts to collect further materials and data and fix fair rent

There is no presumption that the contract rent prevailing between the parties is not fair rent. The ordinary rule of evidence is that the party who asserts a fact should establish it to the satisfaction of the Court Thus where a tenant applies for fixation of fair rent the onus will primarily be on him to show what the fair rent is and that it is lesser than the prevailing contract rate

Though normally a factual finding may not be open to interference in revisional jurisdiction as the one conferred by section 32 of the Madras Public Trust (Regulation of Administration of Agricultural Lands) Act (LVII of 1961) it can be reviewed by the Court of revision on the limited grounds, which may be regarded as legal grounds which if exist, would vitiate the finding of fact as for instance when the finding is based on no evidence at all Hence in the instant case when the District Court exercising revisional powers under section 32 of the Madras Act LVII of 1961 reversed the fixation of fair rent by the Rent Tribunal as being based on no evidence it cannot be said that it acted without or in excess of its jurisdiction or with material irregularity as to justify interference by the High Court under section 115 of the Code of Civil Procedure

Against an order of the District Court made under section 32 of Madras Act LVII of 1961 a revision petition under section 115 of the Civil Procedure Code would be incompetent Though section 29 (2) of the Madras Act LVII of 1961 does not bar the application of section 115 of the Civil Procedure Code to an order made under section 32 the effect of section 58 of the Madras Act LVII of 1961 which bars the jurisdiction of civil Courts except as otherwise provided in the Act, is to make section 115, Civil Procedure Code, inapplicable against an order made under section 32

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, West Tanjore, in C.M P. Nos. 16 and 175 of 1964, against the order of the District Munsif, Valangiman (Rent Tribunal) in E.A. No. 87 of 1963, against the order of the Rent Court, Kumbakonam, in F. R. No. 187 of 1961.

S. Mohan Kumaramangalam, M. A. Sathar Sayeed, A Ramanathan, K Ramachandran and *K Ganapathi*, for Petitioner

R. Sundaralingam and *K Jayaraman*, for Respondent.

The Court delivered the following

JUDGMENT.—This petition by a tenant under section 115, Civil Procedure Code, is to revise an order of the District Court, West Tanjore, by which it reversed an order of the Rent Tribunal, Valangiman, at Kumbakonam, fixing fair rent for the holding, and restored the order of the Presiding Officer, Rent Court, Kumbakonam The application for fixation of fair rent was originally made under the provisions of the Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 Along with this application were tried 158 other similar applications for fixation of fair rent When these applications were pending disposal, the Madras Public Trusts (Regulation of Administrtion of Agricultural Lands) Act, 1961 was enacted, which came into force from 2nd October, 1961. Section 62 of this Act made a partial repeal of the provisions of the Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 in so far as they related to a cultivating tenant in respect of any land held by him under a Public Trust. All these applications were, therefore, by agreement of the parties, treated as filed under the provisions of the Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961. For the purpose of convenience all the applications were clubbed together, common evidence was recorded and were disposed of by a common order. The rent under the contracts between the landlords and tenants varied between 6 and 7½ kalams for a man On behalf of the tenants, only two of them gave evidence, a number of witnesses were examined for the Trust In 1961, at the direction of the Rent Court, a test harvest was made to find out the yield from certain lands The Rent Court was not prepared to act on the oral evidence directed for the applicants. Nor was it satisfied that any reliance could be placed on the result of the test harvest. On a consideration of the rest of the oral evidence for the Trusts it came to the conclusion that the existing rent represented fair rent On that view, it dismissed all

the applications. It does not appear that, in making the disposal, any effort was made either by the Rent Court or by the parties to differentiate one type of holding from another for the purpose of fixation of the fair rent. On appeals by the tenants, the Rent Tribunal agreed with the Rent Court that neither the evidence for the applicants nor the result of the test harvest was useful in determining fair rent. It also agreed with the Rent Court that there was no evidence on record about the actual yield from each of the lands It thought, however, that to remit all the applications would involve considerable hardship and delay In view, of that, the Rent Tribunal proceeded to consider the evidence on behalf of the Trusts and on the supposition that there was no appreciable difference between the various lands fixed fair rent for two broad classes of lands, single and double crop lands In coming to that conclusion, the Rent Tribunal in the main relied on R Ws 3 and 8. Against this order, the Trust filed revision petitions to the District Court of West Tanjore So did some of the tenants, apparently feeling aggrieved by certain observations against their interests in the Rent Tribunal's order The District Court set aisde the Rent Tribunal's order on the main ground that the Rent Tribunal went on the wrong assumption that all single and double crop lands in the village were of the same quality, and that there was no evidence on the yield from the particular lands involved in each of the applications so as to enable the Court to fix fair rent for the same. The District Court also observed that there was nothing in the evidence on record to justify the inference that the fair rent for the lands would be far less than the contract rate. It was of the view that responsibility lay on the tenants to prove what the fair rent would be and it was lesser than the contract rate, and that the tenants failed to establish this. The District Court made further observations that the Rent Tribunal had overlooked the fact that the fair rent fixed by it was in some cases larger than the contract rate It was on those considerations the District Court allowed the petitions of the landlords. That is how the tenants come before this Court.

On behalf of the tenants, Mr Mohan Kumaramangalam has contended that the order of the District Court should be set aide on three grounds (1) the duty of fixing fair rent under the provisions of the Act lay on the Rent Court and it would not, therefore, be a proper disposal that because there was no evidence on record, as it stood, the applications for fair rent should be dismissed, (2) the onus to prove what is fair rent was wrongly thrown by the District Court on the tenants , and (3) the grounds of interference by the District Court are contrary to the actual findings of the Rent Tribunal While answering these grounds, Mr Alagiriswami, learned Counsel for the respondents, contends that the petition under section 115, Civil Procedure Code, raises no question of jurisdiction or material irregularity and that in any case no revision under that provision is competent

Before dealing with the rival contentions, reference may be made to the relevant statutory provisions. The Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961 was enacted to provide for regulating the administration, either by personal cultivation or by lease, of agricultural lands held by Public Trusts and for regulating the relation of Public Trusts and their cultivating tenants in the State of Madras Chapter I of the Act deals with preliminary matters including definitions of a cultivating tenant and fair rent Fair rent is defined to mean the rent payable under Chapter IV Chapter II relates to regulation of cultivation of lands held by Public Trusts and under section 4 it is provided that on and after the date of the commencement of the Act, no Public Trust shall personally cultivate, or lease out land held by such Trust except in accordance with the provisions of the Act A ceiling is placed on personal cultivation by such Public Trust by the following sections Under section 8, the Public Trusts are to lease out the lands reverted to them under section 7 The rest of the provisions in the Chapter are not relevant for our purpose Chapter III contains provisions relating to tenancies. Section 18 secures tenants against eviction except on certain grounds indicated in section 19. Right to restoration of possession in certain circumstances is provided for by section 20. Then comes Chapter IV which by section 23 enjoins that every cultivating tenant under any Public Trust shall be bound to pay to the

Public Trust and every Public Trust shall be entitled to collect from the cultivating tenant fair rent payable under this Chapter. Sub-section (7) of this section directs that no Public Trust shall, after the date of the commencement of the Act, claim or stipulate for payment of any amount by the cultivating tenant in excess of the fair rent or in excess of the public charges which are expressly made payable by the cultivating tenant by the Chapter or the delivery by the cultivating tenant of any article or thing in addition to fair rent. Sub-section (3) of section 24 is to the effect that where the contract of tenancy provides for payment of a rent lower than the fair rent, the former alone will prevail during the contract period Sub-section (1) defines what is fair rent It is a certain percentage of the normal gross produce or its money value in respect of differenct types of lands with different facilities of irrigation Section 28 (1) makes provision for constitution of Rent Courts and Rent Tribunals for the purposes of Chapter IV Then follow sections 29, 32 and 56 :

"29 (1) Notwithstanding any agreement between a public trust and the cultivating tenant, or any decree or order of a Court, either party may apply to the Rent Court for fixation of fair rent or for deciding any dispute arising under this Chapter ,

(2) From every decision of a Rent Court, an appeal shall within such time as may be prescribed, lie to the Rent Tribunal whose decision shall be final, subject to revision, if any under section 32

32 The District Court may call for and examine the record of any Rent Tribunal in respect of any proceeding under this Chapter to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision, or order passed thereon , and if, in any case, it appears to the District Court that any such proceeding, decision or order should be modified, annulled or reversed or remitted for reconsideration, it may pass orders accordingly ,

Provided that the District Court shall not pass any order prejudicial to any party unless he has been given a reasonable opportunity of being heard

58 Except as otherwise provided in this Act, no civil Court shall have jurisdiction to decide or deal with any question which is by or under this Act required to be decided or dealt with by the authorised officer, the Registrar, the Rent Court, the Rent Tribunal or other authority "

Secton 59 contains rule-making power and in exercise of the power, Rules have been framed Rule 23 provides for the procedure of Rent Courts and Rent Tribunals. By rule 24, the provisions of the Civil Procedure Code are made applicable to proceedings of Rent Courts and Rent Tribunals as far as possible. Under rule 28, in hearing an application under the Act, the Rent Court may also depute any officer of the Revenue Department to make local enquiry and inspection and to collect relevant data. For the purpose of determining the normal gross produce, the Rent Court or Rent Tribunal under rule 30 may take into consideration certain specified records which may be of assistance.

In the context of the foregoing statutory provisions and rules, Mr. Mohan Kumaramangalam argues that a duty is cast by them on the Rent Court to fix fair rent, that it cannot, therefore, dispose of the applications merely on the ground that the evidence on record is not sufficient to enable it to come to a conclusion, and that in that case, it is obliged to institute further investigation in order to collect material and data with reference to which fair rent can be fixed On that view, learned Counsel says that if the fixation of fair rent by the Tribunal was not supported by any evidence in relation to the particular holding involved in each application, it should have remitted the application for fresh disposal in the light of the further evidence to be collected and placed on record It was not, according to learned Counsel, justified in merely allowing the petitions of the landlords and restoring the order of the Rent Court In support of this contention, reliance is placed on *Premesh Chandra* v *Banwarilal*[1], and *Dharampaul* v *Yograj*[2]. In my view, this contention cannot be accepted and the decisions relied on by learned Counsel do not assist him. As I understand the statutory provisions and Rules, they cast no such duty on the Rent Court or the Rent Tribunal They do not contemplate that their duty goes further than the disposal of the applications for fair rent on the evidence placed

1. A.I R. 1925 Cal. 898. 2 A.I R. 1953 Punj. 287.

before them. In fact, the jurisdiction of the Rent Court and the extent of it are not in so many terms expressly provided for by the Act. On the other hand, the jurisdiction of the Rent Court to fix fair rent is left to be inferred from section 29 (1) which enables the landlord or tenant to apply to the Rent Court for fixation of fair rent or for deciding any dispute arising under Chapter IV. That is the manner in which the jurisdiction on the Rent Court is indicated. It is true that a landlord cannot or has no right to collect more than the fair rent and if the contract rate is in excess, the former should prevail. But that by itself does not, in my view, cast an obligation on the Rent Court that, notwithstanding the parties not placing before it proper material to enable it to fix fair rent, it should, *suo motu* and irrespective of failure of parties, make all possible efforts to collect further materials and fix fair rent. I can find no justification for casting such a duty or obligation on the Rent Court either from the provisions of the Act or Rules made thereunder. It is entirely within the discretion of the Rent Court, whether in particular circumstances it may dispose of the application for fixation of fair rent on the material available before it or it will direct further investigation to be made either by inspection or report as provided by the Rules or by other means through the parties. The question in each case would be whether the discretion which it possesses has been properly exercised. In *Pramesh Chandra* v *Banwarilal*[1], which was under the Bengal Tenancy Act and related to a suit for enhancement of rent under section 30 (*a*) of that Act, it was held that if the Court was not satisfied with the report of the Revenue Officer, it should direct a further enquiry setting out what further materials were wanted to come to a proper decision and the fact that the suit had been pending for a long time was no ground for not taking steps to bring it to a satisfactory termination and for declining an order for further enquiry. On facts there, the lower appellate Court had reversed the order of the first Court on the ground that the report of the Revenue Officer was not satisfactory. Mukherji, J., was of the view that, in the circumstances of that case, that was not a proper way of disposing of the appeal and the appellate Court must have indicated what further materials were wanted for coming to a proper decision and remitted that matter In the present case, right through before all the three Tribunals, the oral evidence for the applicants and the result of the test harvest were not accepted. No one suggested, as far as can be gleaned from the record, that a fresh test harvest should be made or the applications should be remitted for fresh disposal. The argument before the District Court would appear to have been confined to whether the Rent Tribunal was justified in fixing fair rent on the basis of the evidence directed for the landlords There is no indication in the order of the District Court that anything like a request for remitting or an opportunity for adducing further evidence was made or asked for. In such circumstances, I fail to see what duty is cast on the District Court by the provisions of the Act or by the Rules made thereunder to make a further effort to get fresh evidence which the parties themselves did not offer to adduce, and to remit the applications for fresh disposal It should be remembered that, when there were as many as 159 applicants only two of them gave evidence before the Rent Court.

Dharam Paul v. *Yogaraj*[2], was decided in the light of section 4 of the East Punjab Urban Rent Restriction Act, 1949 Sub-section (1) of this section provided that the Controller shall, on application by the tenant or landlord of a building or rented land fix the fair rent for such building or rented land after holding such enquiry as the Controller thought fit The Punjab High Court was of the view that in cases where on an application for fixation of standard rent the parties omitted to produce necessary evidence, the Controller was not expected to be a mute spectator of the events which took place before him and to make his order solely on the basis of the evidence which the parties had chosen to lead Bhanderi, C.J, was of the view that the law (apparently the learned Judge was having in mind section 4) required the Controller to make one by calling additional evidence if he found that the evidence produced by the parties were inherently defective or was insufficient to enable him to assess the fair rent or to pronounce judgment in

1. A.I.R. 1925 Cal. 898. 2. A I R 1953 Punj 287

the case. But there is no provision in Madras Act LVII of 1961 analogous to section 4 of the East Punjab Urban Rent Restriction Act, 1949. I do not say that the District Court could not have, in the exercise of its discretion, remitted the application for fresh disposal, if it thought that the circumstances required that course. But it is quite a different matter if it is said that as a matter of law or duty imposed by law, it should have resorted to that course, though, as I said, no request was made or further opportunity asked for to adduce further evidence The first ground for the petitioner, therefore, fails.

The next ground of Mr. Mohan Kumaramangalam relates to what he calls placing of onus wrongly on the tenants by the District Court The District Court, in the course of its order, stated ·

"Notwithstanding the fact that the petitioners on whom the responsibility lay to prove that the fair rent was different and lesser than the contract rate grossly failed in establishing the same, the learned Rent Tribunal has attempted to guess as to what should be the fair rent and has without any basis come to the conclusion"

It is with reference to this the argument relating to onus is addressed. In my view, there is no substance in this ground either. There is no presumption that a contract rate is not fair rent. The ordinary rule of evidence is that the party who asserts a fact should establish it to the satisfaction of the Court. The tenants being applicants for fixation of fair rent, it was primarily for them to show what the fair rent was and it was lesser than the contract rate. I think the onus to prove the fact will be on the applicants in the first instance. But in the cirucumstances of this case, I do not think, the question of onus is of any importance, and that the observations of the District Court in any way affect the validity of its order. It does not appear from its order that it has rested merely on the ground of onus. On the other hand, it applied its mind to the entire material on record and came to the conclusion that there was no evidence to support the finding of the Rent Tribunal that the contract rate was more than the fair rent in respect of any particular holding. In any case, I am not persuaded that the observations of the District Court above referred to involve any misdirection in law

The last ground for the petitioners does not also impress me. At one stage of the argument, Mr. Mohan Kumaramangalam suggested that the District Court misread the order of the Rent Tribunal. He contended that the grounds of interference by the District Court were contrary to the actual findings of the Rent Tribunal The main ground, as I have already indicated, of the District Court interfering with the Tribunal's order is that while the lands may be of different quality, no evidence was directed either by the applicants or by the Trusts in relation to the yield from particular holdings involved in each of the applications so as to fix fair rent for the same The District Court, no doubt, was right when it said that the Rent Tribunal committed an error in trying to rely on the evidence of R.Ws. 1,2 and 8 for, what the Rent Tribunal evidently relied on for its decision was the evidence of R Ws 3 and 8. But this error on the part of the District Court does not seem to make any difference in its conclusion

On this view, it may not be necessary to deal with the other legal contentions. But, since I have listened to the arguments in respect of them, I shall briefly deal with those questions Anticipating the first ground of Mr. Alagariswami, it is argued by Mr Mohan Kumaramangalam that the petitions do raise a question of jurisdiction and fall within the scope of section 115, Civil Procedure Code That section is directed against errors of jurisdiction and not against errors of law not involving jurisdiction That proposition is well settled · vide *Balakrishna Udayar* v. *Vasudeva Iyer*[1], and *Venkatadri* v. *H R E.Board, Madras*[2] In the first of these cases, Lord Atkinson, speaking for the Judicial Committee, defined the scope of the section in these terms

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1. L R 44 I A 261 I L R 40 Mad 793 33 M L J 69 A I R 1917 P C 71 1948 F C R 67 1948 F L J 37 I L R. (1950) Mad 1 A.I R. 1948 P C 156
2. (1948) 2 M L J 120 L R 75 I A 185

"the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusion of law or fact in which the question of jurisdiction is not involved"

That view of the section was reiterated by the Privy Council in the second case. Sir John Beaumont, for the Board, stated:

"The section empowers the High Court to satisfy itself upon three matters. (1) that the order of the Subordinate Court is within its jurisdiction, (2) that the case is one in which the Court ought to exercise jurisdiction, and (3) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision"

Putting it in another way, this amounts to saying that the section will apply only if the High Court is satisfied that the Subordinate Court acted without or in excess of its jurisdiction, or failed to exercise a jurisdiction vested in it, or committed a procedural error. None of these grounds will apply to the petition before me. The jurisdiction of the District Court is under section 32. The power given to it is to call for and examine the record in order to satisfy itself as to the regularity of any proceeding or the correctness, legality or propriety of any decision, or order passed by the Rent Tribunal. Where it appears to that Court that any such proceeding or decision or order should be modified, annulled or reversed or remitted for reconsideration, it has under that section, power to pass such order accordingly. The power conferred upon the District Court in such terms is quite wide. It is not suggested that the District Court was not competent to entertain the revision petition, nor was it suggested that in the exercise of its powers under section 32, the District Court committed errors of the type covered by the three grounds urged for the petitioner and that this meant an irregular exercise of jurisdiction on the part of the District Court. But a Court of competence or with jurisdiction, while acting within its competence or jurisdiction, may come to a conclusion which may be right or wrong, but on that account it cannot be said that *ipso jure* there was an error of jurisdiction or material irregularity The error in relation to the merits falling within the jurisdiction can hardly be described as an error of jurisdiction An error of jurisdiction is one which relates to the competence or power of the Court to deal with the subject-matter The District Court, as I said, had the competence to entertain the revision petition, and if that is the case, merely because it committed errors, it cannot be said that it acted without jurisdiction It is true that in *Sasivarna Thevar* v *Ponnu*[1], it was held that a Judge or a Tribunal exercising revisional jurisdiction was not ordinarily competent to interfere with the findings of facts arrived at by the inferior Tribunal. Rajamannar, C J, referred to a decision (unreported) of Rajagopala Aiyangar, J, who, with reference to the powers of revision under the Madras Buildings (Lease and Rent Control) Act, observed that such jurisdiction would not enable interference with findings of fact, unless:

"(*a*) there were no other materials on which such a finding could be based, or (*b*) the finding has been reached by a consideration of irrelevant or inadmissible matter, or (*c*) it is so perverse that no reasonable person could have reached the conclusion, or (*d*) the finding had been reached by an erroneous understanding of the law applicable to the matter"

This statement of the law was referred to by Rajamannar, C J, apparently with approval Though normally a factual finding may not be open to interference in revisional jurisdiction, still as has been observed in that case, it can be reviewed by the Court of revision on the limited grounds which may, in a sense, be regarded as legal grounds, which, if exist, would vitiate the finding of fact. The District Judge in this case found that the fixation of flat fair rent, irrespective of the quality of the lands, was not supported by any evidence That was within its competence Further, the power under section 32 of Madras Act LVII of 1961 appears to be wider than the power under section 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949 with which *Sasivarna Thevar* v *Ponnu*[1], was concerned I am of the view, therefore, that the petition raises no question of jurisdiction or material irregularity. On that ground too the petition must fail.

1. (1957) 1 M.L.J. 158.

There remains for consideration the question whether a revision petition under section 115, Civil Procedure Code, is at all maintainable, in view of section 29 (2) read with section 58 of the Madras Act LVII of 1961. The contention of Mr. Alagiriswami for the respondent is that the effect of a combined reading of the two provisions is to bar totally the jurisdiction of the civil Court, except as provided in the Act. He contends that the order of the Rent Tribunal is made final by section 29 (2) and that this finality operates except for section 32 He says that where a statute creates a liability not existing at common law and prescribes remedies in respect thereof, making orders made thereunder final, the implication is that jurisdiction otherwise than what is comprehended by the Act is barred. On this view, he urges that section 29 (2) itself will bar the application of section 115, Civil Procedure Code, against orders made by the District Court under section 32 But I am unable to accept this contention The finality provided by section 29 (2) has only the effect of barring further appeal Section 29 (2) does not make the order of the District Court made under section 32 final Once the District Court *qua* such Court is given jurisdiction under the Act to make an order, the consequence will be that its procedure will be governed by the Civil Procedure Code and that means, the remedy by revision provided by that Code against the order of the District Court will be available But the further contention of Mr Alagiriswami that the effect of section 58 is to make section 115, Civil Procedure Code inapplicable against an order made under section 32 of Madras Act LVII of 1961 appears, to my mind, to be well-founded. Section 58 bars jurisdiction of civil Courts except as otherwise provided in the Act. The opening words of this section, in my view, give effect to that intention The purpose of the section seems to be that no civil Court should have jurisdiction to deal with any question which is under the Act required to be decided or dealt with by the authorised officer, the Rent Court and the Rent Tribunal, except as provided in the Act In other words, there is a general exclusion of the jurisdiction of the civil Court subject to exceptions provided by the Act. The question of the type comprehended by section 58 will, therefore, be outside the jurisdiction of a civil Court except to the extent to which the Act enables it to deal with it.

The Supreme Court in *S A Industries (P) Ltd.* v *Sarup Singh*[1], while dealing with the scope of section 43 of the Delhi Rent Control Act, 1958 held that the effect of the words used in that section, namely, " Save as otherwise expressly provided in this Act " was to emphasise the fact that the finality of the order could not be questioned by resorting to something outside the Act. The question was, whether an appeal lay under Clause 10 of the Letters Patent for the High Court of Lahore against the judgment of a learned single Judge of that Court in a Second Appeal under section 39 of the Delhi Rent Control Act The Supreme Court held that the appeal did not lie This was in view of the opening words of section 43, which distinguished *Maunga Ba Thaw* v. *Ma Pin*[2]. Though the order of the District Court under section 32 is not made final the opening words of section 58, in my opinion, have that effect and in view of it, no revision would lie under section 115, Civil Procedure Code.

Mr Mohan Kumaramangalam, however, argues that section 43, with which the Supreme Court was concerned is essentially different from section 58 of Madras Act LVII of 1961 Learned Counsel argues that while section 43 is concerned with an order passed on appeal, which is made final and shall not be called in question in any original suit, application or execution proceeding, in section 58 of Madras Act LVII of 1961 the bar is confined only to a question which is, under the Act, required to be decided or dealt with by the specified authority. He says that once section 32 of Madras Act LVII of 1961 provided for a revision from the order of the Rent Tribunal, and the order under section 32 is not made final, then such an order will be open to revision under section 115, Civil Procedure Code He contends that the jurisdiction under section 32 being entrusted to the District Court *qua* District Court and not as a *persona designata* and as an order passed in exercise of such jurisdiction is not made final, the remedies open against that order under

1. A.I.R. 1965 S.C. 1442.
2. I.R. 61 I.A. 158 . A.I.R. 1934 P.C. 81.

the Civil Procedure Code can well be resorted to and that section 58 does not touch an order made under section 32 and bar section 115, Civil Procedure Code I do not think that this construction of section 58 is sound. The words "except as otherwise provided in this Act" clearly, to my mind indicate that the intention of section 58 is to totally bar the jurisdiction of the civil Court and confine its jurisdiction only to the extent to which it is saved by the provisions of the Act in respect of any question of the nature indicated by that section I hold, therefore, that the petition under section 115, Civil Procedure Code, is not maintainable.

The petition is dismissed with costs.

V K — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE T. VENKATADRI

Santharam, minor by next friend Saradambal Ammal . *Appellant**

v.

S. Ramanuja Reddiar ., *Respondent.*

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), sections 3 and 20—Decree for maintenance obtained by illegitimate minor son represented by Court guardian appointed under the Guardians and Wards Act, 1890—Thereafter Act LXXVIII of 1956 coming into force—Minor if becomes major at 18 or 21 for the purpose of enforcing the decree

Under section 20 of the Hindu Adoptions and Maintenance Act, a father is entitled to maintain his illegitimate child so long as he is a minor under section 3 thereof which defines a minor as a person who has not completed the age of 18 years But in the case of a decree for maintenance obtained long before the coming into force of the Hindu Adoptions and Maintenance Act, by a minor illegitimate son represented by a Court guardian appointed under the Guardians and Wards Act, 1890, the minor will not become a major on attaining the age of 18 years even if the Hindu Adoptions and Maintenance Act had come into force meanwhile, but will continue to be a minor until he attains the age of 21 under the Guardians and Wards Act, 1890 Hence an execution petition by the minor to enforce the decree for maintenance relating to a period after he had attained the age of 18 but before he completed 21 will be maintainable even after the coming into force of the Hindu Adoptions and Maintenance Act, because the Act is intended to have operation in addition to and not in derogation of the Guardians and Wards Act, 1890

Appeal against the Order of the District Court, South Arcot, at Cuddalore dated 17th December, 1963, in C.M.A No. 70 of 1963, E P. No 196 of 1962, in O S. No 1 of 1946, Sub-Court, Cuddalore.

P. B Singarachari, for Appellant.

V. Venkataseshayya and *S. Veeraraghavachari*, for Respondent.

The Court made the following

ORDER.—This appeal arises out of execution proceedings in O S. No. 1 of 1946, on the file of the Sub-Court, Cuddalore, a suit instituted by the appellant herein against the respondent herein. The appellant is the illegitimate son of the respondent The decree was originally passed by the Sub-Court, Cuddalore, on 7th February, 1947 and it was confirmed by the High Court on 2nd February, 1951. Long after the decree was confirmed by the High Court in the year 1951, the Hindu Adoptions and Maintenance Act (LXXVIII of 1956) came into effect. The appellant herein filed E P No 196 of 1962, out of which this appeal arises for arrears of maintenance for the period 17th October, 1961 to 17th June, 1962 This application was resisted by the respondent herein as not maintainable on the ground that on the date of presentation of the present E.P. the minor Santharam, *i e*, the appellant herein, became a major as he completed 18 years of age on 31st August, 1961 and further he cannot claim any maintenance since the Act came into force The Courts below have come to the conclusion that the decree obtained by the appellant herein becomes unexecutable since he attained majority on 31st August, 1961, and, therefore, dismissed the E P and the said order has been confirmed by the District Judge. It is against this order, the illegitimate son has preferred the present appeal.

In this appeal, it was urged that since the decree was passed long ago before the Act came into force, he is entitled to execute the decree and that the executing

* A.A.A.O. No. 85 of 1964. 7th January, 1966.

Court cannot go behind the decree. There seems to be some force in this contention urged by learned Counsel for the appellant, but it is unnecessary to go into this question since I have to decide only whether the present E.P. for arrears of maintenance from 17th August, 1961 to 17th August, 1962, is maintainable because admittedly on the date of the presentation of the petition, he had attained 18 years of age The next question is whether the appellant should be considered to be a minor as soon as he reached the age of 18 years, or 21 years under the Indian Majority Act It is common case that the minor was represented by his mother Saradambal, a Court guardian appointed under the Guardian and Wards Act. Under the Guardian and Wards Act, a minor continues to be so till the age of 21. If it is considered that he is a minor appointed under the Guardians and Wards Act, he is still a minor on the date of the petition in spite of the fact that a minor has been defined under section 3 of the Hindu Adoptions and Maintenance Act as a person who has not completed the age of 18 years Under section 20 of the Hindu Adoptions and Maintenance Act, an illegitimate father is entitled to maintain his illegitimate child so long as he is a minor as defined under section 3 who has not completed the age of 18 years. Therefore, the learned Counsel for the respondent contended before me that when there is a specific provision in the Act, that a minor is defined as a person who has not completed the age of 18 years, the other provisions of the other Acts, should not be taken into consideration But there is a decision of Veeraswami, J , who considered all the relevant portions of this section in *Swaminatha* v *Angayarkanni Ammal*[1], At page 230, he has made the following observations

" But as I read the sections in the two enactments I am unable to regard section 4 (*a*) of the Hindu Minority and Guardianship Act as in any way inconsistent with section 3 of the Indian Majority Act. A perusal of the sections of the Hindu Minority and Guardianship Act shows that its purpose is merely to replace the personal law governing a Hindu in respect of the age of minority The Hindu Minority and Guardianship Act itself does not contain provision for appointment of a Court guardian On the other hand, this Act itself, as I already mentioned, provides that its provisions shall be in addition to and not in derogation of the Guardians and Wards Act, 1890 For the purpose of appointment of a Court guardian one has, therefore, to look to the provisions of the Guardians and Wards Act, 1890, and the definition of a minor in the Indian Majority Act Further section 4 (*a*) of the Hindu Minority and Guardianship Act also indicates that the definition of a minor made therein is only for purposes of that Act The purpose of the Act is not to supersede the provisions of the Guardians and Wards Act, 1890, but to supplement it It follows, therefore, that to the extent the first part of section 3 of the Indian Majority Act provides that where a Court guardian has been appointed for the person of a minor he shall be deemed to be a minor until he shall have completed the age of 21 years, it is not inconsistent with the definition of a minor under section 4 (*a*) of the Hindu Minority and Guardianship Act "

Relying on this decision, we can safely presume that on the date of the petition, the appellant continued to be a minor in spite of the fact that he has completed the age of 18 years Section 2 of the Hindu Minority and Guardianship Act says that the provisions of the Act shall be in addition to and not, save as hereinafter expressly provided, in derogation of the Guardians and Wards Act, 1890 Therefore, I feel that the findings arrived at by the Courts below seem to be erroneous, and the E P. is maintainable since even though he had completed 18 years of age, still he continued to be a minor under the Guardians and Wards Act But the other question whether the decree is executable or unexecutable since the Act came into force, is left open.

This appeal is allowed. Each party will bear their own costs throughout. No leave.

V.K. *Appeal allowed.*

1. (1963) 2 M L.J 229.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

M. Ratchaganadan, Proprietor of M. Arokiasami and son . *Appellant**

v.

Messrs. Kishindas Shamdass under by Shyam Sunder and another *Respondents.*

Presidency Towns Insolvency Act (III of 1909), sections 9 (ii), (iii) and 13 (4)—Insolvency proceedings against a trader—Trader departing from his dwelling house or usual place of business—Inference that he did so with intent to defeat or delay his creditors—When can be drawn.

Absenting oneself is not an act of insolvency, unless it be with intent to defeat or delay creditors. Whether the intention exists is a question of fact. If a trader shuts up his shop during business hours or departs from his dwelling house without leaving instructions where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors. But the presumption may be rebutted. No such presumption, however, arises where the debtor has left a representative behind.

Insolvency is a status to which no person should be reduced unless an act of insolvency is fully established to the satisfaction of the Court. A creditor, in particular, ought not to be permitted to utilise this mode of obtaining an adjudication as insolvent, as a kind of pressure in order to realise a debt more economically or by swifter means.

In the instant case, the factory at the place of business of the appellant was intact and working and there were representatives of the appellant there. Further the appellant is possessed of assets substantially exceeding his liabilities and is in a position to satisfy all his creditors within reasonable time. The order adjudicating him as insolvent should therefore be set aside.

Appeal under Clause 15 of the Letters Patent and Order 36, Rule 11 of O.S. Rules, from the order and judgment of the Honourable Mr. Justice Venkataraman, dated 22nd June, 1964 and made in the exercise of the Insolvency Jurisdiction of the High Court in Petition No. 19 of 1963.

P. S. Chinnappa and *K. Hariharan*, for Appellant.

V. P. Raman and *R. Krishnaswamy*, for 1st Respondent.

Official Assignee, 2nd Respondent.

The judgment of the Court was delivered by

Anantanarayanan, O.C.J.—The appeal is from the judgment of Venkataraman, J., in an insolvency proceeding before the learned Judge, and, the learned Judge allowed the proceedings and adjudicated the appellant (Ratchaganadan) as insolvent, under section 13 read with section 9 (*d*) (ii) and (iii) of the Act, mainly on his conclusion of fact that the appellant (insolvent) departed from his dwelling house or usual place of business, and also secluded himself, under such circumstances as to warrant the inference that he did so with intent to defeat or delay his creditors. Since most of the facts are not in dispute, it is sufficient for us to deal with the matter fairly briefly, on the merits of the evidence adduced before the learned Judge.

As far as the present respondent (petitioning-creditor) is concerned, he had to meet a preliminary ground of absence of the requisite territorial jurisdiction in the Court, but we do not propose to dilate on this, for the simple reason that it appears to be very clear to us that, on the materials placed before us and on the principles of law applicable, the adjudication of the appellant cannot be sustained. For the purpose of argument, therefore, we shall assume that the learned Judge had the requisite jurisdiction. We shall also take for established the main facts, *viz.*, that the appellant, who was a cashewnut merchant at Panruti, apparently with very substantial property, had also an address at Madras which was 52, Ayyappa Chetty Street, Mannady, Madras and that the appellant did borrow Rs. 5,000 from the present respondent, a firm of indigenous bankers, furnishing this address at Madras. There has been controversy between the parties whether the rubber-stamp bearing this address in the hundi (Exhibit P-1), was a stamp affixed at the instance of the respondent for a technical purpose or a stamp truly indicating that the appellant

*O.S.A. No. 34 of 1964. 10th March, 1966.

had such a branch place of business at Madras However that might be, and assuming that the appellant had such an address at Madras, it is clear enough from the evidence of the appellant (R W. 1) and the rest of the record, that this place really belonged to one Govindasami and that the telephone at the place belonged to that person Govindasami the reputed friend of the appellant Hence it may very well be that this was not an actual branch, but a convenient address furnished by the appellant as is also indicated by the pass book of the appellant with the Indian Bank, Kothawalchavadi Branch.

The other facts are very simple, and the record is quite clear and definite. The broker who transacted this loan on behalf of the respondent (P W. 2) tried to establish contact with the appellant, both at Madras and at Panrutti, when the loan became due and was not paid The learned Judge has stressed certain possibilities for his view that the facts spoken to by the broker might justify the inference that the appellant had not merely departed from his usual place of business and absented himself, but that he had secluded himself, so as to deprive the creditors of the means of communicating with him. But we are afraid, that, as the records stand, such an inference would appear to be qutie unwarranted The notice, Exhibit P-2, dated 29th December, 1962, sent by post, was returned unserved. But, admittedly, that relates to the Madras address alone. As we have pointed out earlier, the Madras address might merely have been a nominal and convenient designation, for the purpose of loan transactions at Madras There seems to be no doubt that the real place of business of the appellant was at Panrutti that he was having factory there, and that he had extensive properties there, both a number of houses as well as lands Hence, the fact that the notice, Exhibit P-2, was returned unserved, relating to the Madras address is of no significance whatever as at Panrutti the addressee was perhaps temporarily absent As far as the evidence of the broker Prabhat Singh (P.W. 2) is concerned, his failure to contact the appellant at No. 52, Ayyappa Chetty Street, Madras, is, again, not significant, for the very simple reason that this was merely a nominal address for the purposes of the transactions of the appellant at Madras, it is perfectly possible, and even probable, that he was using this place, which belonged to his friend Govindasami, as an address for purposes of account transactions and that it was not a branch office at all

The real gravamen of the charge against the appellant is that this Prabhat Singh (P W 2) also went to Panrutti to the business place or quarters of the appellant, and could not find the appellant there Nor was he able to obtain information where the appellant was He went to Pondicherry in order to contact the father-in-law of the appellant, there again he drew blank But we must point out that the evidence, in this regard falls far short of the requirements of section 9 (*d*) (ii) and (iii) of the Act, earlier referred to The broker *does not* say that he found the factory, or the place of business, shut up or abandoned On the contrary, both the factory and the Office appear to have been working, and persons like the Manager, were available there The broker, apparently, did not proceed to the house of the appellant, in order to make any enquiry at that house, of the members of the family of the appellant, where he had gone. The plea of the appellant, that he was then away at Tiruchirappalli on private business, may be perfectly true, as far as we can judge.

The law on this subject has been stated in a number of decisions, the principles of which are conveniently and tersely set forth by Mulla in his Law of Insolvency, Lecture IV, page 120, paragraph 119 of the 1958 Edition The pertinent extract is as follows .

> "Absenting oneself is not act of insolvency, unless it be with intent to defeat or delay creditors. Whether the intention exists is a question of fact . . . .
> If a trader shuts up his shop during business hours, or departs from his dwelling house, without leaving instructions where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors ; but the absence may be satisfactorily accounted for, and the presumption may be rebutted. No such presumption, however, arises where the debtor has left a representative behind,.........."

The difficulty of applying the criteria to the present meagre facts on record will at once be evident We need not stress that insolvency is a status to which no person should be reduced, unless an act of insolvency is fully established to the satisfaction of the Court A creditor, in particular, ought not to be permitted to utilise this mode, of obtaining an adjudication as insolvent, as a kind of pressure, in order to realise a debt more economically or by swifter means In the present case, as far as Prahhat Singh's evidence about Panrutti is concerned, it is clear that the creditor himself never went there, and that only the broker did so Even P W. 2 found the factory and the place of business intact and working, and there were representatives of the absent debtor, if they could not furnish any relevant information, P W. 2 could have proceeded to the house of the appellant in the same town, and made enquiries of the members of the family, which clearly he did not do.

We did not want to leave the matter merely there, for it could be said that the record does nevertherless justify some suspicion against the appellant that his absenteeism could be a device, to put it in one word Hence, we were also concerned with the general situation of the debtor, in order to judge if it would be at all likely that the debtor had secluded himself from creditors, with intent to defeat or delay their claims. Further, under section 13 (4) (*b*) "if the debtor appears and satisfies the Court that he is able to pay his debts," the Court has the power and duty to dismiss the petition. For judging the general situation, this appeal was adjourned twice, and particulars were called for, as elaborately as we could do so, concerning the total assets and estate of the appellant, the total indebtendness of the appellant and the extent to which he could be characterised as solvent to-day. We found, certainly, to our surprise, that the appellant has a large number of houses at Panrutti and substantial landed properties and, in the light of a report that his wife, may lay claim to certain of these properties as properties held in her own right, an affidavit from the wife has also been filed, disclaiming any such pretensions on her part Naturally, at the moment we are not embarking upon a meticulous enquiry into the assets and liabilities of the appellant, and our conclusions can only be approximate and tentative. Even so, the inference seems to be irresistible that the appellant has a very substantial estate, perhaps worth between three to four lakhs of rupees, even on a conservative estimate, while the total of his liabilities, as placed before us, is within two lakhs of rupees It may be that these conclusions may have to be modified by a thorough enquiry, but, as broad indications, we do not doubt their truth. We thus find that the appellant is a man possessed of assets substantially exceeding his liabilities, and we have no doubt that he is in a position to satisfy all his creditors within reasonable time

Our attention has been drawn to a passage in the judgment of Rankin, C J, in *Pratapmall Rameshwhar* v *Chunilal Jahuri*[1], to the effect that the test is not whether the debts could be paid if liquidation is proceeded with, but whether the debtor could fully satisfy his creditors, provided of course that some reasonable time was given We must also take judicial notice of the appreciating values of the immovable properties to-day, particularly in urban or semi-urban areas, and the case with which such properties could be sold, and converted into liquid cash We have no doubt that if the data made available to us are correct, the appellant can fully satisfy his creditors in cash, within a quite reasonable period. On that inference, we must hold that it is most unlikely that his temporary absence on the occasion in question was due to an intention to defeat or delay this particular creditor, or his creditors in general Further, since the *hundi* was only of the value of Rs. 5,000 this is quite a small claim against a fairly wealthy man, as far as we can judge.

For these reasons, we are unable to support the order of adjudication of the learned Judge (Venkataraman, J) on the facts and on the principles of law applicable to those facts. The appeal will therefore have to be allowed, and the order of adjudication set aside. Needless to say, this does not imply that other creditors of the appellant are not at liberty to take such action as is available to them in law,

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1. I L R. 60 Cal 34 and 346

with regard to their claims We must carefully refrain from expiessing any view on that matter, one way or the other.

The parties will bear their own costs. The costs of the Official Assignee will come from the assets in nis hands.

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Sri La Sri Somasundara Gnana Desiga Swamigal, Madathipathi of Kovilur Mutt, represented by Power-Agent Sivaprakasa Swamigal .. *Petitioner**

v.

Sri Krishnandaswami .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *sections* 12, 28 *read with the* Explanation *and* 30 *—Objection as to adequacy of Court-fee paid—Defendant's right to raise—If can be raised after issue of a commission under Order* 26 *of the Civil Procedure Code for examination of plaintiff—Scope and applicability of section* 28 *—Provision when attracted—Word " manager " in the* Explanation *to section* 28*—Scope and meaning of.*

Interpretation of Statutes—Construction of fiscal statutes

Under section 12 (2) of the Madrs Court-fees and Suits Valuation Act (XIV of 1955) a statutory right has been given to the defendant to raise objection as to the adequacy of the Court-fee paid on the plaint The pleas open to the defendant are two (1) that the subject-matter of the suit has not been properly valued and (2) that the fee paid is not sufficient The category into which the suit falls or the classification for the purpose of Court-fee must be decided only on the allegations in the plaint irrespective of the defence set up in the written statement

Section 12 (2) entitles the defendant to plead that the fee paid is not sufficient either in his written statement or before evidence is recorded on the merits of the claim Where in a suit the Court makes an order under Order 26 of the Code of Civil Procedure for the examination of the plaintiff on commission it cannot be said that any evidence has been recorded on the merits of the claim, the defendant is not thereby precluded from raising an objection as to the adequacy of the court-fee by filing an additional written statement or the Court from adjudicating on the question.

Where a plaint falls under two categories and one such category is special and another general the fee chargeable shall be the fee appropriate to the special description Thus, where a suit can fall under section 28, the fact that section 30 can also be applied will not take away the right of the plaintiff to value the suit under section 28 and pay the Court-fee accordingly

A reading of section 28 of the Madras Court-fees and Suits Valuation Act makes it clear that it contemplates suits where the right of management is alone in dispute For the applicability of section 28 to a suit for recovery of trust property the suit must be between trustees or rival claimants to the office of trustee or between a trustee and a person who has ceased to be a trustee The suit contemplated under section 28 is not a suit between rival trusts Any ambiguity in the first part of the section is cleared up by the inclusion of suits between rival claimants to trusteeship and suits between a new trustee and an ex-trustee within the scope of the section The latter categories can properly comprise only suits where the plaint proceeds not merely on the basis that the property belongs to the trust of which the plaintiff is the trustee but that the defendant's connection with the property is also as belonging to the same trust

The *Explanation* to section 28 provides that a manager of properties of a Hindu, Muslim or other religious or charitable endowment shall be deemed to be a trustee thereof for the purpose of section 28. The argument that the word " manager " in the *Explanation* is used in a special sense and is restricted to the head such as the *Mahant, Mutavalli* or the *Madathipathi* of a religious or charitable endowment, is untenable The intent manifest on the plain terms of section 28 being to limit the Court-fee payable when the claims put forward relates to competing claims for management, there is no reason for restricting the meaning of the word " manager " to the head of an endowment If a person in possession against whom a suit is filed by the trustee of the endowment has been a manager of the property as commonly understood, the case would directly fall within the language of section 28 read with the *Explanation* When the plain language of the *Explanation* includes also an ordinary manager who has been placed in possession of property of a religious or charitable institution, there is no reason why claims against such manager should be excluded from the benefits of section 28

In the instant case the plaintiff claiming to be the *Madathipathi* of the Kovilur Mutt instituted a suit against the defendant for the recovery of the properties at Tirukkalar belonging to the Mutt which according to the plaint were placed in management of the defendant on behalf of the Kovilur Mutt as the agent of the plaintiff The suit was filed because the plaintiff was not willing to allow the defendant to be in management any longer as his agent on the ground, among others, that he mis-

*C R P No 942 of 1965. 22nd April, 1966

appropriated a portion of the income *Prima facie* section 28 read with the *Explanation* will apply to the suit if this is a Hindu, Muslim or other religious or charitable endowment But there is no specific averment in the plaint that the suit institution is a Hindu religious or charitable endowment. In the circumstances, the proper thing would be to send the matter back to the trial Court for disposal of the matter after giving an opportunity to the plaintiff to amend the plaint suitably if he so chooses

Petition under sections 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Kumbakonam, dated 19th April, 1965 and made in O S No 14 of 1964

R. Gopalaswami Iyengar, for Petitioner.

S. Kothandarama Nayanar, for Respondent.

The Government Pleader on notice.

The Court made the following

ORDER —This Revision Petition involves the construction of sections 12 and 28 of the Madras Court-fees and Suits Valuation Act, 1955 (Madras Act XIV of 1955). The suit was originally instituted in the Subordinate Judge's Court, Thanjavur, in 1960 and registered there as O S No. 14 of 1961 The suit was laid for recovery of possession of the properties set out in Schedules A to D-2 of the plaint and for rendition of accounts by the defendant and future profits, the plaintiff instituting the suit as *Madathipathi* of Kovilur Mutt. The plaintiff had valued the suit for purpose of Court-fee and jurisdiction at Rs 2,34,652 and paid Court-fee Rs 200 under section 28 of the Act on the relief of possession, the maximum Court-fee payable under that section, and a Court-fee of Rs 75 in respect of relief for accounting under section 35 (1) of the Act The suit was later transferred to the Subordinate Judge's Court, Kumbakonam, where it became O S No. 14 of 1964. Then for the first time the office raised the question of Court-fee payable on the plaint, but later dropped that matter, as the plaint had already been registered. The defendant who did not raise any objection as regards the Court-fee in his written statement filed when the suit was pending on the file of the Subordinate Judge of Thanjavur, in August, 1964 by way of additional written statement, raised the question that the suit has not been properly valued and the fee paid is not sufficient It is on this objection by the defendant that the Court considered the question and passed an order on the 19th of April, 1965 holding that the Court-fee paid by the plaintiff was not correct and that he had to re-value the plaint in regard to recovery of possession under section 30 of the Act and pay Court-fee thereon under section 30 of the Act.

It is necessary to set out briefly the averments in the plaint The plaintiff claims to be the present *Madathipathi* or *Adhinakarathar* of Kovilur Mutt in Ramnad District It is stated that a predecessor of the present plaintiff, the 5th *Madathipathi* of the Kovilur Mutt, before his death, went to Tirukkalar in or about 1907 for renovating Sri Parijathavaneswarar temple there and for the purposes of his stay, he built a *madam* there and called it as Ko, a Madalayam It is stated that as the head of the Kovilur Mutt, with the funds of the Mutt, for the upkeep of the *Mutt* and for *Kattalai* started by him in the temple at Tirukkalar, he acquired properties and a *Samadhi* has been erected for him at Tirukkalar The present plaintiff states that succeeding head of the Kovilur Mutt added further properties and he also purchased further properties and utilised the income for the *Madalayam* at Tirukkalar, for the maintenance of the *Samadhi Pooja* and worship there The plaint proceeds to aver that an establishment was maintained at Tirukkalar to look after the lands purchased, to have worship at the *Samadhi* conducted and to feed devotees and disciples that might resort there, and that the practice of the *Adhinakarathars* (head) of Kovilur Mutt was to send one or other disciple to Tirukkalar as agent to supervise and look after the *Madalayam*, the buildings and lands, all detailed in the schedule to the plaint It is stated that the defendant as a disciple has been similarly sent to Tirukkalar to supervise and attend to the affairs by the *Adhinakarathar* Mahadeva Gnana Desiga Swamigal, a predecessor of the present plaintiff The position of the defendant in relation to the suit properties is thus set out in paragraph 6 of the plaint :

"The defendant came over to Tirukkalar and supervised and attended to the said affairs as a disciple and agent of Mahadeva Swamigal He was sometimes called *karwar* After the demise of the said Mahadeva Swamigal, plaintiff in turn orally appointed and required defendant to supervise and manage the properties on his behalf and as his agent and he was doing so and sending accounts of such management as before to plaintiff"

In paragraph 7 it is stated that the plaintiff learnt that out of the funds and income of the properties 'entrusted' to his management, the defendant had purchased some items of properties in his own name. The defendant is charged with changing the name of the *Madalayam* without the knowledge of the plaintiff from Ko, a Matam to Ko, a Veera Madalayam It is stated that thereupon the plaintiff asked the defendant to explain the matter and also called upon him to render accounts and deliver possession of the *mutt* and other properties set out in the plaint schedules. In paragraph 8 it is stated that the plaintiff is not willing to allow the defendant to be in possession or management of the Madam and the properties or to look after the same as his agent. The plaintiff, therefore, as head of the *mutt*, it is stated, is entitled to recover the suit properties from the defendant and entitled further to call upon the defendant to render accounts for the past years

In the additional written statement the defendant filed questioning the propriety of valuation of the suit the defendant states that the suit was not one where the properties admittedly belonged to the plaint *madam*, and that the dispute did not relate to claims by rival trustees of the same *madam* It is stated, that this is a case where the defendant denied the title of the plaintiff to the suit properties and where the defendant claims title to the same on behalf of another *mutt*. The defendant's case in his written statement is that he was not sent to Tirukkalar as *Karvar* and is not a subordinate of the Kovilur Mutt He claims to have been installed as *madathipathi*. of the suit *mutt* and to be functioning as such As the basis for determination of Court-fee is the suit as laid in the plaint, it is not necessary to refer to the contentions in the defendant's written statement or the claims put forward by him.

Before taking up the question as to the proper valuation of the plaint in the case, I shall dispose of what may be regarded as a preliminary objection raised by the plaintiff to the consideration of the question of Court-fee at the instance of the defendant after the registration of the suit It is pointed out that the defendant has taken objection to the valuation more than three years after the registration of the suit and after the plaintiff had taken out an application under Order 26 of the Code of Civil Procedure for the issue of a commission for examination of the plaintiff as witness at Kovilur, Ramnad District The application had been filed when the suit was pending in the Sub-Court at Thanjavur on the 16th of July, 1962 and the suit was transferred to the Sub-Court, Kumbakonam, by an order dated 29th February, 1964 The application was taken up for hearing on 12th August, 1964, and an order was passed directing the issue of a commission, on the 21st August, 1964. The additional written statement raising objection to the valuation is dated 24th August, 1964 The defendant filed a Civil Revision Petition against the order allowing the application for examination of the plaintiff on commission and that was disposed of in favour of the plaintiff on the 5th of March, 1965. The order in question now under challenge in the present revision petition was passed on the 19th of April, 1965 on the plea raised by the defendant in his additional statement. Learned Counsel for the plaintiff-petitioner relies upon the provisions of section 12 of the Court-fees Act The material portion of the section is set out.

"12 (1) In every suit instituted in any Court other than the High Court, the Court shall, before ordering the plaint to be registered, decide on the materials and allegations contained in the plaint and on the materials contained in the statement, if any, filed under section 10 the proper fee payable thereon, the decision being however subject to review, further review and correction in the manner specified in the succeeding sub-sections

(2) Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding sub-section, not later, plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient All question arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim

(3) A defendant added after issues have been framed on the merits of the claim may, in the written statement filed by him plead that the subject-matter of the suit has not been properly valuep or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim........"

It will be seen that under the present Court-fees Act a statutory right has been given to the defendant to raise objection to the adequacy of the Court-fee paid on the plaint But under the guise of raising objection to the valuation, the defendant cannot question the correctness of the allegations in the plaint or seek to go behind the same for the purpose of valuation The field of investigation at the stage is limited The pleas open to the defendant are two one that the subject-matter of the suit has not been properly valued and two that the fee paid is not sufficient. A defendant evidently has been statutorily given a right to raise the question of valuation of the subject-matter of the suit and Court-fee paid, as he is interested in the taxation of costs of the suit Also the question of valuation may affect the jurisdiction of the Court in some cases. But the category into which the suit falls or the classification for the purpose of Court-fee must be decided only on the allegations in the plaint irrespective of the defence set up in the written statement I am unable to appreciate how the issue of commission can preclude the Court from deciding whether a proper fee has been paid on objection raised by the defendant Sub-section (2) of section 12 entitles the defendant to plead that the subject-matter of the suit has not been properly valued or the fee paid is not sufficient either in his written statement or before evidence is recorded on the merits of the claim. It cannot be said in this case that any evidence has been recorded on the merits of the claim. Only a commission has been issued under Order 26 for examination of the plaintiff himself as witness. Under Order 26, rule 7 after a commission has been duly executed it shall be returned to the Court together with the evidence taken under it and the commission and the return thereto then form part of the record of the suit. Order 26, rule 8 set out when evidence taken under a commission shall be read as evidence in the suit Learned Counsel for the petitioner laid stress on sub-section (3) of section 12 I fail to see anything in the language of the sub-section to help the plaintiff in precluding the defendant from raising the objection at the stage in which the suit now stands It is pointed out in *Raju Gramani* v *Srinivasa Gramani*[1], that the term 'plead' in the section has to be understood in a comprehensive manner and the defendant, after the written statement has been filed and before evidence is recorded, may either apply to the Court for permission to amend the written statement, or, if that is not done, he may approach the Court with a petition raising the question of inadequacy of Court-fee. Here the defendant has been permitted to raise the question of Court-fee by way of additional written statement and I see no bar to the Court entertaining the objection, as no evidence has been recorded in that matter The fact that the defendant is proceeding *mala fide* and wants to deter recording of evidence of the plaintiff who is stated to be old and infirm is neither here nor there

I shall now take up for consideration the question whether the plaint in the present case falls under section 28 of the Act. Section 28 runs thus

"In a suit for possession or joint possession of trust property or for a declaratory decree, whether with or without consequential relief in respect of it, between trustees or rival claimants to the office of trustees or between a trustee and a person who has ceased to be trustee, fee shall be computed on one-fifth of the market value of the property subject to a maximum fee of rupees two hundred or where the property has no market value, on rupees one thousand

Provided that, where the property does not have a market value, value for the purpose of determining the jurisdiction of Courts shall be such amount as the plaintiff shall state in the plaint

Explanation —For the purpose of this section, property comprised in a Hindu, Muslim or other religious or charitable endowment shall be deemed to be trust property and the manager of any such property shall be deemed to be the trustee thereof "

Section 30 of the Act, the section relied upon by the defendant and now accepted by the trial Court as the section applicable, is a general provision relating to suits for possession of immovable property and runs thus :

"In a suit for possession of immovable property not otherwise provided for, fee shall be computed on the market value of the property or on rupees four hundred, whichever is higher "

By reason of section 9 of the Act, when a plaint falls under two categories and one such category is special and another general, the fee chargeable shall be the fee

1. (1958) 71 L.W. 116.

appropriate to the special description. In the present case if the suit can fall under section 28, the fact that section 30 can also be applied will not take away the right of the plaintiff to value the suit under section 28 and pay the Court-fee accordingly A reading of section 28 makes one thing clear that it contemplates suits where the right of management is alone in dispute. There can be no dispute and in fact there is no dispute that the property in question in the prsent suit is trust property. The suit is also for possession of trust property. But for the applicability of section 28 that will not be sufficient. A suit for recovery of trust property by the trustee from a stranger to the trust must be valued like any other suit for possession, by an owner against a stranger in possession. The law does not make any distinction in that regard. For the applicability of section 28 the suit must be between trustees or rival claimants to the office of trustee or between a trustee and a person who had ceased to be a trustee Mr. Gopalaswami Iyengar for the petitioner contends that the suit can be viewed as one between trustees or rival claimants to the office of trustee. He refers to the contention of the defendant that he himself is the *Madathipathi* of Tirukkalar *Mutt* On this it is contended that the defendant claims to hold office as a *Madathipathi*. He is therefore a trustee holding trust property The plaintiff claims the property also as *Madathipathi* as property belonging to the Kovilur Mutt. His claim also is therefore as a trustee Therefore, it is contended that the suit is between trustees. The contention is wholly untenable. To start with such is not the plaintiff's case Secondly, the liability for Court-fee is determined on the allegations in the plaint and the defendant's pleas cannot affect it Further as I understand the section, the suit contemplated under section 28 is not a suit between rival trusts Any ambiguity in the first part of the section is cleared up in including suits between rival claimants to trusteeship and suits between a new trustee and an ex-trustee within the scope of the section The latter categories can properly comprise only suits where the plaint proceeds not merely on the basis that the property belongs to the trust of which the plaintiff is the trustee but that the defendant's connection with the property is also as belonging to the same trust. The fact that the plaint may set out the defendant's repudiation of such claim cannot alter the position, the averments that determine the character of the claim being the averments on which the plaintiff's claim to relief is rested Equally, the fact that on the pleadings issues are raised as to the title of the plaint trust to the suit property is immaterial. Section 28 contemplates trust institutions in respect of which there may be several trustees and possession, more properly joint possession, is sought by one or more trustees against the other or others, or there may be disputes as to possession between rival persons claiming to be trustees of the self-same trust. The person impleaded as defendant may deny the plaintiffs title, but when the suit is framed as one for possession between trustees or between rival claimants to the office of trustee or between a trustee and a person who has ceased to be a trustee in respect of a trust institution, then the only matter really raised in issue by the plaintiff is the right of management of the property. If the cause of action as adumberated in the plaint itself is between different trusts represented by their respective trustees, it becomes just a claim to the property and not a claim to property as annexed to a trusteeship about which there is dispute.

The plaint in this case does not proceed on the basis that the defendant is also at present a trustee , nor is it alleged that the defendant wrongfully claims to be a trustee of the plaint trust. The case in the plaint may be concisely placed thus · The suit properties inclusive of a *Madalayam* at Tirukkalar described in schedules A to D-2 in the plaint are properties belonging to the Kovilur *Mutt* of which the plaintiff is the present *Adhinakarthar* or *Madathipathi* The defenant had been sent out as the agent of the Kovilur Mutt to look after and supervise the suit properties and placed in management of the suit properties In pursuance of this arrangement he had been managing the properties and sending accounts of management to the plaintiff, and for the reasons set out in the plaint the plaintiff is not willing to allow the defendant to continue in management of the *Madalayam* and its properties or look after the same as his agent The plaintiff therefore seeks recovery of possession of the properties from the defendant. In subsistance the plaintiff seeks to relieve the defendant of his management of the suit properties and assume management

of the same One thing is clear that this is not a suit for possession or joint possession of trust properties between trustees or rival claimants to the office of trustee.

The question for consideration is whether the suit could be considered to be one between a trustee and a person who has ceased to be a trustee, the *Explanation* to section 28 providing that a manager of the property of religious or charitable endowment shall be deemed to be a trustee thereof. On bahalf of the State, the learned Government Pleader contends that the word 'manager' in the *Explanation* to section 28 is used in a special sense and is a legislative recognition of the position of the head or *Mahant* or *Madathipathi* by whatever name he may be called of a religious or charitable endowment It is therefore argued that the defendant in this case could not be considered to be a manager as contemplated in the *Explanation*, it not being the plaintiff's case that the defendant, was at any time a head or *Madathipathi* of the plaint institution The contention on behalf of the plaintiff as against this is, that when we interpret a fiscal enactment we must interpret the provision as it stands and should not limit or otherwise restrict the language of the enactment by reference to any past history Learned Counsel for the plaintiff submits that in interpreting taxing provisions one should not import logic or reason and must go by the plain terms of the section, particularly where there is no ambiguity and if the provisions so interpreted, is favourable to the subject. In *Partington* v *Attn. Gen.*[1], Lord Cairns, said :

"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient, because, as I understand the principle of all fiscal legislation, it is this, if the person sought to be taxed comel within the letter of the law he must be taxed, however great the hardship may appear to the judiciat mind to be On the other hand, if the Crown, seeking to recover the tax, cannot bring the subjece within the letter of the Law, the subject is free, however apparently within the spirit of the law ths case might otherwise appear to be In other words, if there be admissible, in any statute, what i, called at equitable construction, certainly such a construction is not admissible in a taxing statute where you simply adhere to the words of the statute "

In *Canadian Eagle Oil Co.* v *R*[2], Viscount Simon, L C, said

"In the words of the late Rowlatt, J (in *Cape Brandy Syndicate* v *I R C*[3], whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase " in a taxing Act one has to look at what is clearly said There is no room for any intendement There is no equity about a tax. There is no presumption as to a tax Nothing is to be read in, nothing is to be implied One can only look fairly at the language used "

The principle is well established that if in giving words of the statute their natural meaning that in their literal construction, a case would not be covered by the statute imposing a fee, the fee should not be levied There should be no attempt to construe the statute benevolently in favour of the State on a supposed intendment, as the omission if any could be cured by legislation. But equally it is a well known principle of construction that when in the language used in an Act there is a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpretad unless a contrary intention appears Here I am unable to say that the word ' manager ' has received a restricted meaning and with reference to religious or charitable endowments could denote only the head of the institution for the time being. On the contrary, judicial decisions have only given a wider scope and content to the words ' trust' and ' trustee' in relation to Hindu and Muslim religious or charitable endowments for certain purposes, to take in the heads of these institutions who are in reality only managers.

The learned Government Pleader drew my attention to the decision of the Judicial Committee in *Vidya Varuthi Thirtha* v *Balusami Ayyar*[4]. In that case the Judicial Committee had to construe the words, conveyed or bequeathed in trust and afterwards transferred by the trustee, found in Article 134 of the Limitation Act of 1908

" Neither under the Hindu Law nor in the Muhammadan system is any property 'conveyed' to a *Shebait* or a *Muta walli*, in the case of a dedication Nor is any property vested in him, whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage "

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1 (1869) L R 4 H L 100 (122).
2. L.R. (1946) A C. 119, 140.
3. L.R. (1921) 1 K.B. 64, 71.
4 (1928) L R 48 I A 302 . 41 M L.J. 346 : I.L.R. 44 Mad. 831, 843, 840.

It is observed by the Judicial Committee :

> "These men (spiritual teachers under whom were founded Hindu colleges and monasteries under the names of Mutt) had and have ample discretion in the application of the funds of the institutions, but always subject to certain obligations and duties equally governed by custom and usage called by whatever name, he is only the manager and custodian of the idol or the institution"

As in view of the decision of the Judicial Committee in the above case that heads of Hindu and Muhammadan religious or charitable institutions *Shebait*, *Mutawalli* *Mahant* or *Madathipathi* however described are not trustees in the technical sense of the word, the Limitation Act itself was amended in 1929 by a specific provision under section 10, in the following words

> " For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for specific purpose, and the manager of any such property shall be deemed to be the trustee thereof "

The learned Goverment Pleader referred to this amendment and emphasised that the language is more or less similar to that employed in the *Explanation* to section 28. But in the Limitation Act the phraseology used is " shall be deemed to be property vested in trust for a specific purpose" as against the language in the present Court-fees Act "shall be deemed to be trust property ". Section 10 of the Limitation Act requires for its application that the property should be vested in trust.

Reference may also be made to the decision of the Judicial Committee in *Ram Parkash Das* v *Anand Das*[1], where referring to the position of a *Mahant*, Lord Shaw said

> "He sits upon the *Gadi* , he initiates candidates into the mysteries of the cult , he superintends the worship of the idol and the accustomed spiritual rites , he manages the property of the institution , he administers its affairs , and the whole assets are vested in him as the owner thereof in trust for the institution itself"

These decisions only show that from a legalistic view a *mahant* or head of the institution only manages the property of the institution and administers its affairs, and that he is not a trustee in the strict sense of the word as defined in the Indian Trust Act or as understood in the English system Also it followed that the office could not be separated from the properties which form endowment of the office. In *Kandaswami Thambiran* v. *Vagheesam Pillai*[2], before the present Court-fees Act, after noticing that there was no distinction between the office and property of an endowment and that the plaintiff could not ask for a mere declaration of title to the office when not in possession but must ask for possession and failure to do so would vitiate the suit, it was observed by the Full Bench :

> " It may be regrettable that a person who has been ousted wrongly from an office and the control of the properties attached to it should be required to pay a Court-fee based on the value of the properties before he can file a suit to remedy the wrong, but the Court cannot take such hardship into consideration when deciding the effect of section 42 of the Specific Relief Act When a Court-fee fixed by the Court-fees Act is unfair, it is for the Legislature to interfere "

In the suit which was the subject-matter of consideration by the Full Bench the plaintiff sought to establish his title to the office of *Pandarasannadhi* or *Mahant* of the Tiruvannamalai Mutt and the first defendant on his part claimed to be the lawful holder of the office In addition to denying the right claimed by the plaintiff, the defendant set up the bar of section 42 of the Specific Relief Act. Evidently in view of the observations made by this Court in the aforesaid Full Bench decision, the Government in pursuance of its powers under section 35 of the Court-fees Act (VII of 1870), issued a notification G O No. 5791 dated 17th May, 1943 reducing the Court-fee payable in suits by trustees in certain cases The notification ran thus :

> " In exercise of the powers conferred by section 35 of the Court-fees Act, 1870, His Excellancy the Governor of Madras is hereby pleased to reduce the fee chargeble in any suit for possession or joint possession between trustees, or between a plaintiff who claims to be a trustee and a defendant who is alleged to have ceased to be a trustee, to one-third of what it would be if the suit related to a claim in respect of private property "

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1. (1916) L R 43 I A 73 31 M L J 1 (P.C.) : I L.R. 43 Cal. 707.
2. (1941) 2 M L J 463 . I L R. (1942) Mad. 13 at 23. (F B)

It will be seen that though the notification uses the word 'trustee' the reduction granted has been understood to be applicable to Hindu and Muslim religious institutions, Mutts, wakfs and other endowments. In an unreported case, *P. A. Venkatalakshmi Narasimha Chaiyalu* v. *The Deities of Pattabhiramaswami Varu and Kesavaswami Varu*[1], where the plaintiffs claiming themselves to be trustees alleged that though the archakas in possession had no manner of right or interest in the suit properties nevertheless they and their predecessors in office in the absence of properly constituted or *de jure* trustees got into possession of the suit properties and had been managing the same, that therefore they should be deemed to be *de facto* trustee or trustees *de son tort*, and that they ceased to be trustees after coming into force of Madras Act XI of 1927 being trespassers, it is observed :

> "In our opinion, the facts alleged in paragraph 9 bring the case within the scope of the provision for reduction We do not think that the application of the notification should be restricted to cases in which trustees lawfully entitled to the office of trustee sue to recover possession of the property from persons who had been lawfully appointed as trustees but whose term of office had expired or who had otherwise ceased to be trustees, as for instance by removal We think that there is nothing either in the spirit or the letter of the notification which prevents its application to a case like the present where the defendants are persons who originally came into possession and continued to be in possession on behalf of the deities and who had been managing the properties as if they were trustees though there was no specific legal authority in support of their possession as trustees "

In another unreported decision of this Court in *Masilathaswami Temple* v. *The Governor-General in Council*[2], where the aforesaid notification was applied is a case of considerable significance In that case the plaint alleged that in or about 1817 the East Indian Company through the Board of Revenue at Madras took over the management of the temple and entered into possession of its properties including the suit properties In or about 1849 the management of the temple and some other properties were handed back to the trustees of the temple. The suit properties had been retained and possession of them was sought by the trustees for the time being on the ground that the defendants the Governor-General in Council and the Province of Madras, were successors of the East Indian Company. Reduction of Court-fee under the aforesaid notification was sought contending that the defendants must be deemed to be trustees Bell, J., on the allegations in the plaint to the aforesaid effect held that the notification applied.

Madras Act XIV of 1955 which replaced the Court-fees Act of 1870 and purports to be an Act amending and consolidating the law relating to Court-fee and valuation of suits in the State of Madras, by section 28 not only gives statutory recognition to the old notification but makes it wider in application. It practically covers cases of trust properties where the subject-matter of the suit relates only to management and not title to the properties though *ex necessitate rei* possession has to be asked for. It must be noted that though the head of a religious institution, a *Mahant*, *Adhinakarta*, *Madathipathi* or *Mutawali* may not have been considered to be a trustee in the strict sense of the word, decisions referred to above show that he has been considered to be a trustee in a general way, only he is not a trustee in whom the property is vested in trust in law, see also Mukherjee's Hindu Law of Religious and Charitable Trusts II Edition at page 395. Even though there was no provision like the present *Explanation* to section 28, properties comprised in Hindu Religious and Charitable Endowments have been deemed to be trust properties for the application of the notification.

As already stated, the ambit of section 28 is wider than that of the notification and the intent manifest on the plain terms of the section being to limit the Court-fees payable when the claim put forward in the plaint for possession relates to competing claims for management I see no reason for restricting the meaning of the word 'manager' of the property of a Hindu, Muslim or other religious or charitable endowment to the head of the endowment. If a person in possession against whom a suit is filed by the trustee of the endowment has been a manager of the property as commonly understood the case would directly fall within the language of the

1. App. No. 535 of 1946. 2. C.R.P. No. 237 of 1946.

section read with the *Explanation.* ' I am not constrained by anything in the Act or by the language of the section to limit the applicability of the section As pointed out in Maxwell on Interpretation of Statutes, 11th edition, at page 278, in construing statutes imposing burden, " in a case of reasonable doubt the construction most beneficial to the subject is to be adopted " The Judicial pronouncements relied upon by the learned Government Pleader only point out that the heads of these institutions are only in the position of managers with certain special rights, the ownership being vested in the institutions or deities The *Explanation* to section 28 only states that the manager of the property of these institutions should be deemed to be trustees for the purpose of section 28 But that does not necessarily limit the concept of the term manager to the heads of institutions like *Mahant* or *Mutawalli*, *Madathipathi* only When the *Explanation* on the plain language, of the section includes also an ordinary manager of the property of the endowment who has been placed in possession by the head of the institution, I do not see why the claims against such manager should be excluded from the benefits derived under section 28 of the Act

The plaint in this case read as a whole sets out a claim by the head of the institution against the manager of the properties belonging to the same institution relieving him of his management. *Prima facei*, if this is a Hindu, Muslim or other religious or charitable endowment, section 28 will apply and the Court-fee paid will be sufficient It is now contended on behalf of the defendant that the institution, the Kovilur Mutt in question is not a Hindu, a Muslim or other religious or charitable endowment to come within the scope of the section It is stated that it cannot be deemed to be a Hindu religious or charitable endowment at all Though the plaint proceeds on the basis of the existance of a religious institution with its *Madathipathi* and endowments, there is no specific averment that the suit institution is a Hindu religious or charitable endowment. But the arguments before me by the learned Government Pleader was on that basis and the matter has been discussed by the trial Court also on that basis Only at the close of the judgment, learned Counsel for the defendant with leave submitted that the character of this very institution the Kovilur Mutt has been the subject of consideration in decisions of this Court. On behalf of the plaintiff it is submitted that the question that came up for consideration in earlier proceedings was as to whether the Madras Hindu Religious and Charitable Endowments Act would apply to the institution and there was no consideration of the question whether outside the Act, this institution could be considered to be a Hindu, religious or charitable institution. Even if it is found that this institution does not fall under the provisions of the said Act, if in fact it is otherwise a Hindu religious or other charitable institution, there can be no doubt that section 28 will apply. The plaintiff had no opportunity to meet this aspect of the matter, the defendant in the written statement setting up his own title as the Madathipathi of the Tirukkalar Mutt. At least, if the plaintiff had made specific averments in this regard for the purpose of Court-fee, the Court can proceed on the basis of the averment. True the very claim to apply section 28 implies that the institution is of the kind contemplated therein But there is no specific averment to that effect, and learned Counsel for the plaintiff has contented himself with claiming leave to amend the plaint suitably. In the circumstances, the proper thing would be to declare the true scope of section 28 of the Court-fees and Suit Valuation Act and send the matter back to the trial Court for disposal after appropriate steps for amendment of the plaint. Any recognition of the nature of the institution for purposes of Court-fee on the plaintiff's averments even in this regard will not preclude the defendant from questioning the same at the appropriate stage. For the present I leave it open to the plaintiff if he chooses, to apply for amendment of the plaint. The application for amendment will be considered by the trial Court on the merits and Court-fee levied according to law.

A commission has been issued for the examination of the plaintiffs, who is said to be old. It is desirable in the circumstances that the evidence be taken by the Commissioner without further delay. But the evidence shall not form part of the

record till the question of Court-fee payable on the plaint is adjudicated and decided upon Learned Counsel for the plaintiff further submits that no objection will be taken by the plaintiff to the defendant pursuing his contention as to the proper Court-fee payable on the ground that evidence had been taken on commission. As the suit is already being old it is necessary that it should be brought up for trial as early as possible

In the result, the Civil Revision Petition is allowed in the above terms.

No costs.

V.K. —— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction)

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice*, AND MR. JUSTICE P. RAMAKRISHNAN

S. V. Viswanathan .. *Appellant**

v

G P Rangaswamy and others *Respondents.*

Madras District Municipalities Act (V of 1920), *sections* 44 *and* 47—*Rules for decision of disputes as to validity of elections held under the Act, Rule* 10 (*c*)—*Election petition—Voter's name appearing in the electoral roll—Election Court's jurisdiction to investigate into disqualification of such voter by reason of his being below* 21 *years of age and set aside election as materially affected*

Constitution of India (1950), *Article* 326—*Non-attainment of* 21 *years of age—Inclusion of that person's name in the Assembly Electoral Rules—If* non est—*Municipal electoral roll following the same—If can be questioned in election petition*

Where in an election petition challenging the election of a member to a municipal ward under the Madras District Municipalities Act (V of 1920) it is alleged that one of the ballot papers allotted to a voter, though his name appeared in the electoral roll of the municipality, is invalid because on the date of the poll that voter was below 21 years of age and therefore was incompetent to vote, the Election Court hearing the petition will have jurisdiction to investigate into the age of the voter concerned and set aside the election if it finds that the voter was below 21 years of age and the election was materially affected by reason of the reception of his vote The argument that the Madras District Municipalities Act and the Rules framed thereunder is self-contained code and that the Election Court a creature of that code has no jurisdiction to traverse beyond it and rely upon Article 326 of the Constitution of India for adding the disqualification of non-attainment of 21 years of age for the voter, so long as that disqualification had not been incorporated in the Madras Act and the Rules framed thereunder, would clearly be untenable.

It is true that there is no provision in the Madras District Municipalities Act which incorporates the age disqualification contained in Article 326 of the Constitution and that section 44 (6) of the Act provides that every voter whose name appeared in the electoral roll pertaining to a municipality would be entitled to vote subject only to the other provisions of the Act But if it is found that the voter in question suffered a constitutional disability; such as the one laid down in Article 326 of the Constitution, it would have the effect of rendering the electoral roll so far as his inclusion therein is concerned *non est* and void An electoral roll is only a statutory instrument and a statutory instrument prepared in violation of a constitutional provision must be deemed to be void from its very inception Thus the reception of a voter from a vote who is disqualified on account of non-age would, though his name appears in the electoral roll of the municipality, be a case of an improper reception of a vote within the meaning of rule 10 (*c*) of the Rules For Decision of Disputes as to Validity of Elections Held Under, The Madras District Municipalities Act because it would amount to the receiving of the vote of a non-existent voter Consequently the Election Court acting under rule 10 (*c*) would have every jurisdiction to hold that the inclusion of the name is a nullity, that the name is thereby effaced and hence the vote is invalid

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr Justice Srinivasan dated 26th March, 1965, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2118 of 1964 presented under Article 226 of the Constitution of India to issue a Writ of *Certiorari* calling for the records relating to the order of the second respondent herein dated 1st December, 1964 in O.P. No. 14 of 1964 and quash the said order.

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*W.A. No. 99 of 1965. 11th July, 1966.

M K Nambiar, for Appellant.

Mohan Kumaramangalam, for Respondents

The Court delivered the following Judgments.

Anantanarayanan, C.J—My learned brother has dealt with the facts and the issues involved in the appeal so fully, that I am thereby enabled to dispense with a recapitulation of the background of fact, and the parts of the statute law that are applicable to the case I am in entire agreement with his conclusions, and the reasoning on which they are based, but, in view of the interest of the main issue, I have been tempted to set forth a brief analysis.

Perhaps the best way to deal with the main issue, will be to state the argument of Sri Kumaramangalam for the respondents, in its clearest and strongest form. The argument is, tersely, to the effect that the Election Tribunal had no jurisdiction to proceed into the question of the impugned vote in this case, hence, it is argued, the learned Judge (Srinivasan, J) had no option but to quash the order of the Election Tribunal, by the issue of the writ. Sri Kumaramangalam points out that, even under the Representation of the People Act, 1950, the disqualifications specified in section 16 of Part III do not include the violation of Article 326 of the Constitution, by inscribing on the Rolls a voter who is less than twenty-one years of age Under section 16 (1) (*a*), not being a citizen of India is a disqualification. But there is no reference to minimum age Under section 19 (*a*), however, only a person who is not less than twenty-one years of age on the qualifying date, is entitled to be registered. There is a procedure prescribed under the Act itself, for correction of entries in the Electoral Rolls (section 22) for inclusion of names in Electoral Rolls (section 23), and for appeals (section 24) Under section 100 (1) of the Act, the improper reception, refusal or rejection of a vote is a ground of attack against the election, and also under section 100 (1) (*d*) (iv) "any non-compliance with the provisions of the Constitution" On the contrary, as my learned brother has shown, section 44 of the Madras District Municipalities Act (sub-sections (1), (2) and (6)) makes it clear that a person whose name is included in the Electoral Roll for the Assembly Constituency, is thereby entitled to be included in the Electoral Roll for the Municipality, and is entitled to vote so long as his name appears in the Roll for the Municipality "as so revised" (section 44 (6)) The disqualifications of voters are in section 47, and do not relate to age Further, under rule 10 (*c*) of the Rules for decision of disputes as to validity of elections held under Madras District Municipalities Act, it is only the improper reception or refusal of a vote, or non-compliance with the provisions of the Act or the Rules, which can be a ground of attack, there is no reference to infringement of any part of the Constitution.

The argument of Sri Kumaramangalam, therefore, distils to this, while there may be procedure for revising the Assembly Electoral Roll under the Representation of the People Act, and thereby an error of this kind (inclusion in the Rolls of a person less than 21 years of age) can be rectified, and there may be a procedure equally available for rectification of defects of the Municipal Rolls, which adopt the Assembly Rolls, under section 44, there is no procedure for a Returning Officer to reject a vote, on the ground that that name ought not to have been included in the Electoral Roll for the Assembly, and thereby, for the municipality. On the contrary, even the Election Tribunal would be exceeding his jurisdiction, by going into this question of fact of the age of the voter, under rule 10 (*c*) of the Rules that I have just referred to When such jurisdiction is lacking, we ought to totally ignore the finding in the present case, that the voter was less than 21 years of age, and should not have been included in the Assembly Electoral Roll at all. The question of jurisdiction comes first, and therefore the learned Judge (Srinivasan, J.) rightly issued the writ quashing the order of the Tribunal.

In my view, this argument has great plausibility and force, if it stood alone, apart from the constitutional issue which is involved Actually, it could well be argued that, as Srinivasan, J, felt, the decision to issue the writ quashing the order of the Tribunal is greatly reinforced by the observations of the Supreme Court in *B. M.*

Ramaswamy v. *B. M Krishnamurthy*[1] But that very decision helps us, in the present context, with regard to the constitutional issue, for the opposite conclusion that we have arrived at The matter is necessarily different and widely different, where the inclusion of the name in the Electoral Roll is a nullity, or is *non est*, because it infringes the Constitution The following passage in the judgment of the Supreme Court is here significant :

"The terms of the section are clear and the action of the Electoral Registration Officer in including the name of the appellant in the electoral roll, though illegal, cannot be questioned in a civil Court but it could be rectified only in the manner prescribed by law, *i e*, by preferring an appeal under rule 27 of the Rules, or by resorting to any other appropriate remedy But it was contended before the High Court that the action of the Electoral Registration Officer was a nullity inasmuch as he made the order without giving notice as required by the Rules We find it difficult to say that the action of the Electoral Registration Officer is a nullity . . Such non-compliance cannot make the officer's act *non est* .."

This very passage reinforces our view that the consequence of such a ground of attack, or its validity might have been viewed very differently by their Lordships, if it had been based upon an infringement of the Constitution, rendering the inclusion of the name a nullity, or *non est*. Where this has happened, we are constrained. to agree with the ground urged by the learned Counsel for the appellant, Sri M.K Nambiar that the fact is precisely as if the name is not in the Electoral Roll for the Assembly, at all.

This line of reasoning can very simply and tersely be demonstrated In Basu's Commentary on the Constitution of India (5th Edition), Volume I, at page 159 will be found set forth a statement of the constitutional law in this country, following the dicta of Marshall, C J., that a law or an instrument repugnant to the Constitution is *void* or *non est*, it is a nullity, and the result is that as though it had never been enacted Emphatic passages to that effect will be found in *Deep Chand's case*[2], and my learned brother has sufficiently dealt with this aspect Again, we are in entire agreement with the argument of Sri Nambiar, that the Electoral Roll for the Assembly can only be regarded as an instrument created by statute, namely, the Representation of the People Act, by force of the provisions of which it has come into existence Certainly, it cannot be a mere material or physical object. As my learned Brother has affirmed, where such an instrument created by statute infringes the Constitution, in any respect that part or respect is void and is a nullity, upon even stronger grounds than in the case of an Act of Parliament

In certain earlier decisions, which are not without relevance to this context, I have stressed that the old division of property into movable and immovable embodied in such enactments as the General Clauses Act and the Civil Procedure Code, may no longer suffice for the juristic objectives of a Welfare State On the contrary, a different orientation in this respect would appear to be called for, and the basic division may be that adumbrated by Dicey, namely, corporeal and incorporeal, movable and immovable being the forms or sub-divisions of corporeal property. Clearly, an incorporeal property right has to be distinguished from the paper on which it is engrossed, for the simple reason that the right may, or does, survive the destruction of the paper, which is merely evidence of the right Upon analogous reasoning, an Assembly Electoral Roll is an instrument created by statute, and not merely a material object.

Sri Kumaramangalam does not dispute that, where the Assembly Roll did not include the name of a voter, and that person attempted to vote at a Municipal Election, it could well be argued that, his name being omitted from the Assembly Roll and the corresponding Municipality Roll, he cannot vote, the objective fact whether the name is there or is not there would certainly be gone into by the Election Tribunal But, where the name has been included in the Assembly Roll, infringing the provisions of the Constitution, the effect, as we have seen, is that that part of the instrument is void, and is *non est* It is precisely as though it had never existed · *Vide* passages in *Deep Chand's case*[2].

1. (1964) 2 S.C.J. 268 : A.I R. 1963 S C. 458 2. 1959 S C J. 1069: A.I.R 1959 S C 648 at 657.

Consequently in my view, the Election Tribunal had every jurisdiction to hold that the inclusion of the name is a nullity, that the name is thereby effaced and hence that the vote is invalid

The argument of Sri Kumaramangalam that there is no adult suffrage prescribed in Article 326 of the Constitution for elections to local bodies, is beside the point, we are not now considering whether, under some other law, a man could vote at a Municipal Election, though less than 21 years of age On the above reasoning, it follows that the appeal has to be allowed, the order of the Election Tribunal has to be confirmed and the writ petition dismissed We are making no observations upon the propriety of amending rule 10 (*c*) of the Rules, with regard to the decision of disputes in regard to elections under the District Municipalities Act, to include a ground of infringement of the Constitution, parallel to section 100 (1) (*d*) (iv) of the Representation of the People Act That is entirely for the authorities to decide. We are accepting the finding of the fact that the voter was less than 21 years of age, as the learned Judge (Srinivasan, J.) did. It is not disputed that, in writ jurisdiction, we have to accept that finding.

Ramakrishnan, J—The facts leading to this Writ Appeal filed under the Letters Patent against the Judgment of Srinivasan, J, in Writ Petition No 2118 of 1964 are briefly the following. In the election for Ward No IX of the Gobichettipalayam Municipality held on 5th February, 1964, it was found at the counting of votes, that the writ petitioner G P. Rangaswami and the first respondent S.V. Viswanathan had secured an equal number of votes In such a case, under the procedure prescribed, the election had to be determined by the casting of lots, and this resulted in the writ petitioner being declared elected Aggrieved against this result of the election, the first respondent filed an election petition O P No 14 of 1964. Several grounds invalidating the election were canvassed therein, but for the present purpose we are concerned with a single allegation, that ballot paper No 361 allotted to the son of the petitioner, one Sri Ramakrishnan, was invalid, because, on the date of the poll, this voter was below 21 years of age and was, therefore, incompetent to vote After taking evidence, the Election Commissioner found this allegation of fact to be established This resulted in the petitioner securing only 514 valid votes, as against 515 votes secured by the first respondent The Election Commissioner thereupon set aside the election of the petitioner, and declared the first respondent to have been duly elected Against the aforesaid decision, the aggrieved petitioner filed a writ petition, which came up before Srinivasan, J, for the issue of a writ of *certiorari* under Article 226 of the Constitution, for the purpose of quashing the order of the Election Commissioner The learned Judge, after a careful consideration of the relevant provisions of the District Municipalities Act (V of 1920) and the Rules framed thereunder came to the conclusion that in view of the specific provisions of the District Municipalities Act relating to the finality of electoral rolls and the restricted scope of the enquiry before the Election Commissioner, for the purpose of invalidating an election, investigation into the disqualification of a voter by reason of his being below twenty-one years of age within the meaning of Article 326 of the Constitution, would fall outside the jurisdiction of the Election Tribunal. Consequently, he allowed the writ petition and quashed the order of the Election Commissioner. The first respondent has filed the present appeal before us under clause 15 of the Letters Patent.

The relevant provisions of the District Municipalities Act are the following :

"44 (1) Every person (whose name is included in such part of the electoral roll for any Assembly Constituency as relates to the Municipality or any portion thereof) shall be entitled to be included in the Electoral Roll for the municipality prepared for the purposes of this Act, and no other person shall be entitled to be included in such roll

44 (2) As soon as may be, after the electoral rolls for the Assembly Constituencies which consist of, or comprise, the municipality or any portion thereof, have been published revised or amended in pursuance of the Representation of the People Act, 1950, any person authorised by the Election authorities in this behalf shall publish in such manner as the State Government may direct, the portions of the said rolls which relate to the Municipality or of the alterations therein, as the electoral roll for the municipality or as alterations to such roll, as the case may be"

44 (6) Every person whose name appears in the electoral roll for the municipality, as so revised shall, so long as it remains in force, be entitled subject to the provisions of this Act to vote at an election; and no person whose name does not appear in such roll shall vote at an election

47 Notwithstanding anything contained in sub-section (6) of section 44 a person who is of unsound mind, a deaf-muste or a leper shall not be entitled to vote at any election to a Municipal Council "

We are not concerned with sections 48 and 49 which deal with disqualification for membership of the Council, because the main point for consideration in the preseut case, is the disqualification of a voter The provisions for the settlement of disputes as to the validity of an election held under the Act, are contained in the Rules framed under section 303 (2) (*a*) and (*b*) of the Act Rule 1 provides for a Subordinate Judge being appointed as the Election Court, and rule 10 (*c*) reads.

" If in the opinion of the Election Commissioner the result of the election has been materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a nomination paper or vote or by any non-compliance with the provisions of the Act or the Rules made thereunder the election of such returned candidate shall be void "

The arguments which were accepted by Srinivasan, J , were that under the provisions of the District Municipalities Act, 1920, above referred to, the Electoral roll for any Assembly constituency, prepared in pursuance of the Representation of the People Act, 1950 becomes by incorporation, the electoral roll for the corresponding ward of a municipality, and every person whose name is in the aforesaid electoral roll shall be entitled to vote at an election The only disabilities in his case would be those enunciated in the other provisions of Act, namely, unsoundness of mind, deaf-mutism and leprosy (section 47) ; since other disqualifications like not being a citizen of India or not being 21 years of age on the date prescribed, are disqualifications under Article 326 of the Constitution, and not disqualifications incorporated in the District Municipalities Act, they fall outside the scope of the enquiry by the Election Court for invalidating an election and such enquiry must be confined to the limits prescribed in rule 10 (*c*) above mentioned Since the name of the voter in question was incorporated in the electoral roll, there could be no question of any irregularity under the first part of rule 10 (*c*) which deals with the improper reception of a vote (by the Presiding Officer at the time of polling) So far as the second part of rule 10 (*c*) is concerned, what is alleged in this case is the non-compliance with Article 326 of the Constitution but there is no allegation that any provision of the District Municipalities Act or the Rules made thereunder has not been complied with For the present purpose, the District Municipalities Act and the Rules framed thereunder must be viewed as a complete code, and in the absence of any provision therein incorporating the disqualification in Article 326 of the Constitution, it will be outside the jurisdiction of the Election Court to take such a disqualification into account Srinivasan, J distinguished the Madras Village Panchayats Act, where section 12 (1) provided that every person whose name is included or who is included or who is qualified to be included in that part of the electoral roll for any territorial constituency of the Madras Legislative Assembly which relates to the village or any portion thereof shall be entitled to be included in the electoral roll for the panchayat This provision was interpreted in *Venkatakondiah* v. *Election Commissioner*[1], as giving jurisdiction to the Election Commissioner to investigate the disqualification to be enrolled as a voter under the twenty-one year rule In this connection, the learned Judge also referred to the Full Bench decision of the Allahabad High Court in *G Mohiudin* v *Election Tribunal*[2], where the facts were more or less analogous to those in the prsent case In the provisions of the statute before them, namely, Uttar Pradesh Municipalities Act, the fact of non-attainment of 21 years of age was not specifically mentioned as a disqualification either for entry in the electoral roll or for voting That Act provided that persons whose names were *for the time being* entered in the electoral rolls would be the electors for the purpose. It was held that the right which they had thus secured, to vote, could not be questioned whether at the time of the election or at the stage of the hearing of the election petition, but that right could be challenged only if they happened to be subject to

1. 1955 An W R. 133 : A I R. 1955 Andhra 109. 2. A.I.R 1959 All. 357(F B).

any disqualification provided for by or under the Uttar Pradesh Municipalities Act, but the fact of non-attainment of 21 years of age was not such a disqualification. There was a decision of the Andhra Pradesh High Court *Radhakrishnamurthi* v. *Subordinate Judge, Bapatla*[1], which was also considered by the learned Judge There the question was a different one, it related to nomination, of a person who was below 21 years of age, and whether he was competent to stand as a candidate for election. It was held by the Andhra Pradesh High Court on a combined reading of section 19 of the Representation of People Act and section 44 of the District Municipalities Act that a person below 21 years of age could not stand as a candidate It may also be noted in this connection, that in election petitions under the Representation of the People Act, under section 100 (1) (*d*) (iv), the non-compliance with the provisions of the Constitution (besides the provisions of the Representation of the People Act or any Rules or orders made under that Act) is specifically made a ground for declaring an election to be void, whereas such a provision is absent in the District Municipalities Act.

It would, therefore, appear that the entire reasoning before the learned Judge, proceeded on the basis that notwithstanding the undisputed finding of fact that the voter Ramakrishnan was below 21 years of age on the date of poll, the Election Commissioner, acting under the provisions of rule 10 (*c*) of the Rules framed under the District Municipalities Act, had no jurisdiction to declare his vote invalid and consequently to set aside the election of the writ petitioner In other words, the District Municipalities Act, and the Rules framed thereunder is a self-contained code, and the Election Tribunal, a creature of that code, had no jurisdiction to traverse beyond it, and rely upon Article 326 of the Constitution, for adding the disqualification of non-attainment of 21 years of age, for the voter, so long as that disqualification had not been incorporated in the District Municipalities Act and the Rules framed thereunder.

Before us, learned Counsel Sri M K Nambiar, appearing for the appellant, does not dispute the broad proposition thus laid down, that there is no provision in the District Municipalities Act which incorporates the age disqualification under Article 326 of the Constitution ; but he urged that if it is found by the Tribunal that the voter in question, suffered a constitutional disability, it would have the effect of rendering the electoral roll, so far as his inclusion therein is concerned *non est* and void The reception of his vote would, therefore, be a case of an improper reception of a vote wihin the meaning of the first part of rule 10 (*c*), because it would amount to the receiving of the vote of a non-existent voter This argument no doubt involves a fiction, the fiction being to treat the actual entry in the roll, of a voter's name, when that voter suffers from a fundamental constitutional disability, as null and void The problem that we have been asked to consider in this case, is whether such an approach to the question can be permitted in the light of the various legal principles that have been pressed before us The learned Counsel for the appellant referred to the observation of the Supreme Court in *Deep Chand* v *State of U P*[2], where following the observation of Mahajan, J, in an earlier case, their Lordships observed

> " It is obvious that if a statute has been enacted and is repugnant to the Constitution the statute is void since its very birth and anything done under it is also void and illegal The Courts in America have followed the logical result of this rule and even convictions made under such an unconstitutional statute have been set aside by issuing appropriate writs If a statute is void from its very birth then anything done under it whether closed, completed or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law "

The argument of the learned Counsel is that here we do not have a statute which has to be declared to be void by reason of its repugnancy to the Constitution, but a statutory instrument, namely, the electoral roll prepared for the Assembly treated as the effective roll for a municipal-ward for election to the Municipal Council and that, if a statute repugnant to the constitution can be deemed to be void from

1. (1960) 2 An W R 308 at page 659.
2. 1959 S C J. 1069: A.I.R 1959 S C. 648

its very birth, *a fortiori*, a statutory instrument prepared in violation of a constitutional provision, must be also deemed to be void from its very inception Learned Counsel also referred to the observation in Basu's Commentary on the Constitution of India, Fifth Edition, Volume 1 at pages 157 and 158 where the learned author extracts the observations from the celebrated judgment of Chief Justice Marshall who propounded the doctrine in the United States in the following manner .

"If, then, the Courts are to regard the Constitution, and the Constitution is superior to an ordinary Act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply"

As mentioned already, the learned Counsel wants to extend this principle not to an enactment but to a statutory instrument, the electoral roll in this case, which being in conformity with the District Municipalities Act, will be a valid roll if that Act alone was taken into account but would be invalid, so far as the voter Ramakrishnan is concerned, if Article 326 of the Constitution is taken into account Learned Counsel also referred to the observations of the Supreme Court in *B M Ramaswamy* v. *B M Krishnomurthy*[1], wherein their Lordships drew a distinction between a case where the inclusion of the name of a voter in the electoral roll was illegal, and where it was void In the particular case before them, they observed that there was no provision in the Mysore Village Panchayats and Local Boards Act—under which the election of a particular candidate was disputed (before the Election Court)—which enabled the High Court to set aside the election, on the ground that though the name of a candidate was in the list, it had been included therein illegally They also observed that non-compliance with the prescribed procedure, did not render the Electoral Registration Officer's action a nullity or *non est*, though his order might be liable to be set aside in appeal or by resorting to any other appropriate remedy. Learned Counsel for the appellant, urges that the case before us, is one where the action of the Returning Officer in receiving the vote of the disputed voter was improper because by a fiction, his name itself should be deemed to have been not in the roll We have to observe that the point stressed before us in this form, by the learned Counsel for the appellant, was not urged by him either before the Election Commissioner or before the learned Judge This point was also not considered in the Full Bench decision of the Allahabad High Court quoted earlier and which was followed by Srinivasan, J Learned Counsel urges that it is the duty of Courts of law as well as of Tribunals, to act in accordance with the provisions of the Constitution, and whenever and at whatever stage, their attention is drawn to the fact that there has been a patent violation of a constitutional provision, whether in legislating an enactment or in preparing a statutory instrument, the Courts as well as Tribunals have a duty to give effect to the Constitution In the present case, apart from the question about the self-contained nature of the District Municipalities Act and the Rules framed thereunder, limiting the scope of investigation of Election Tribunals and determining their jurisdiction, when a specific breach of the Constitution in the preparation of the statutory instrument, whose contents have to be relied upon for decision in the present dispute, has been brought to the notice of the Election Tribunal, as well as of this Court, effect will have to be given to the consequences which will follow from such a breach In the light of the authorities quoted above, we are of the opinion that such a constitutional breach involves the rendering of the electoral roll a nullity so far as the disputed voter's name is concerned, and his name entered in the roll must be deemed as *non est*, for the purpose of acceptance or reception of his vote It would, therefore, follow that the appeal has to be and is hereby allowed, and the writ petition dismissed The order of the Election Tribunal is confirmed No order as to costs.

V.K. *Appeal allowed.*

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1. (1964) 2 S C J. 268: A I R. 1963 S C. 458.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE M NATESAN.

Corporation of Madras .. *Petitioner**

v

Srimathi Ch. Balamoney and others .. *Respondents.*

Madras City Municipal Act (IV of 1918), Schedule IV, Part V—Taxation Rules, rules 15 and 17—Scope of rule 15—Property tax—Order of Taxation Appeals Committee—Appeal from to Small Causes Court under rule 15 at the instance of Commissioner—Competency

Interpretation of Statutes—Interpretation avoiding repugnancy and absurdity to be favoured

Against an order of the Taxation Appeals Committee with regard to assessment of property tax an appeal to the Court of Small Causes under rule 15 of the Taxation Rules of the Madras City Municipal Act (IV of 1919) at the instance of the Commissioner of the Corporation would be incompetent An appeal under rule 15 would lie only at the instance of the aggrieved rate payer Though no doubt the first part of rule 15 (*a*) giving the right of appeal by itself imposes no limitation as to the party who may appeal, from the collocation and juxtaposition of the material words in rules 15 and 17 it follows that the appeal provided for is not one by the Commissioner If the Commissioner can be an appellant an absurdity would be introduced in complying with the mandatory requirements in rule 15 (*a*) (i) and (ii).

It is a recognised principle of construction of statutes that when words of a statute yield to two interpretations, one leading to repugnance and absurdity and another, though restricting the meaning of the words, avoiding repugnance, inconsistency, anomaly, etc , the Legislature could be presumed to have intended the latter interpretation Where the plain language does not demand it requirements of consistency and the need to avoid repugnancy or absurdity call for a restricted interpretation.

A right of appeal is always a creation of statute and cannot be assumed or read into because the occasion demands it.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of Small Causes (Chief Judge), Madras, dated 4th December, 1961, and passed in M T A Nos 10, 11, 12, 13 and 14 of 1961.

T. Chengalvaroyan, for Petitioner

T Ramaprasada Rao, for Respondents.

The Court made the following

ORDER —These revisions are preferred by the Corporation of Madras against an order of the Chief Judge, Court of Small Causes, Madras, rejecting *in limine* the five appeals preferred by the Corporation against an order of the Taxation Appeals Committee of the Corporation

With reference to assessment of property tax there were appeals before the Taxation Appeals Committee by the owners and according to the Corporation several important questions arose for consideration therein There was a difference of view as to the assessment between the Chairman of the Committee, the Chairman being a judicial officer, and the other two members of the Committee who were members of the Corporation The majority view prevailed and the Commissioner in the view that he could not get the particular assessment rectified in any other way preferred the appeals in question under rule 15 of the Taxation Rules of the Madras City Municipal Act Objection was taken by the assessee to the maintainability of the appeals, their contention being that only an aggrieved assessee can appeal under that provision and the Commissioner had no right of appeal This preliminary objection has been accepted by the learned Chief Judge, Court of Small Causes.

Mr T Chengalvaroyan, learned Counsel for the Corporation, took me through the relevant provisions relating to the assessment of property tax and the revision and appeals therefrom. But I find that however necessary it may be to provide for an appeal to the Court by the Commissioner also on the rules of the statute the Commissioner has no right of appeal Schedule IV to the City Municipal Act

*C.R.P. No. 1122 to 1126 of 1962 24th June, 1965.

contains the taxation rules Part I-A of the Schedule provides for assessment of the property tax and against assessments, revisions by Commissioner are provided under rules 2, 3-A and 4 Part V under the heading *revision of assessment* contains provision for appeal from orders of the Commissioner Rule 13-A provides for the mode of enquiry by the Commissioner of the petitions under rules 2, 3-A and 4 Rule 14 provides that an objector who is dissatisfied with the order passed by the Commissioner may appeal against it to a Committee called the Taxation Appeal Committee and consisting of three members two of whom shall be members of the Council elected by it and the third person appointed by the State Government The person so appointed by the Government is the Chairman of the Committee Rule 15 provides for the appeal from the Taxation Appeal Committee.

This Taxation Appeals Committee is given all the powers of a Standing Committee under section 26 (1) of the City Municipal Act and the provisions of sub-section (2) of section 26 are made to apply to the requisitions made by the Taxation Appeals Committee as if it were a Standing Committee Reference is made to this provision as the learned Chief Judge has relied upon this provision also in coming to his conclusion reading it along with section 366 of the Act The learned Chief Judge is of the view that by giving the Taxation Appeals Committees the powers of a Standing Committee the Commissioner is given the power to refer the matter in question to the Council under section 366 (2), his order being substantially modified The learned Chief Judge equates the Taxation Appeals Committee to the Standing Committee for all purposes for this conclusion I do not find that the Rules warrant such a conclusion Certain powers to call for reports and to requisition the Commissioner for the production of records, correspondence, plan, etc , are given to the Council or Standing Committee under section 26. The Taxation Appeals Committee is equated to the Standing Committee only in respect of the power for requisition under section 26 (1) Section 366 provides for appeal to the Standing Committee from certain orders of the Commissioner, *inter alia*, from orders of the Commissioner that are made appealable under the Rules, and the Commissioner is empowered within one month of the date of any decision of the Standing Committee by which he is aggrieved to refer the matter to the Council and to withhold giving effect to the order or decision of the Standing Committee pending the decision of the Council in the matter A finality is given to the decision of the Council on the matter These provisions in my view cannot and do not affect the taxation procedure which stands apart and is separately provided Arming the Taxation Appeals Committee with the powers of the Standing Committee is one thing Provision for appeal from its orders is a different matter The appellate forum, in this case the Council, has to be empowered to entertain the appeal by the Commissioner from the orders against him by the Taxation Appeals Committee A right of appeal is always a creation of statute and has to be provided It cannot be read into or assumed because the occasion demands it But this question does not directly arise for consideration and we are now concerned only with the competency of an appeal by the Commissioner to the Court Whether the Commissioner has a right of appeal or not has to be judged only by reference to the rules relating to the provision for appeals to the Court of Small Causes

In interpreting these provisions we may have to note this that Part V is headed *Revision of Assessment*, Part I-A being headed *Assessment of the Property Tax* The assessment order made by the Commissioner under rule 13-A can be taken up in appeal by the objector to the Taxation Appeals Committee When we come to the provision for appeal against the orders of this Committee, rule 15 runs thus

"*Rule* 15 (*a*) An appeal shall lie to the Small Cause Court against any decision of the Taxation Appeals Committee constituted under rule 14, but no such appeal shall be heard by the said Court, unless—

(i) a notice of intention to appeal has been given to the Commissioner within ten days from the date on which such decision was communicated by registered post and

(ii) the petition of appeal has been presented within fourteen days from the date on which such decisidn was communlcated by reglstered post and the tax has been paid within the said period."

Then comes an explanation which it is unnecessary to refer for the present purpose. Sub-clause (*b*) of rule 15 may also be passed over Clause (*c*) of rule 15 is an important provision in the present context It runs thus :

"The notice of intention to appeal shall state the name, occupation and residence of the appellant or of his attorney or vakil if any and the grounds of appeal."

Rule 17 runs thus

"The Small Cause Court may, if it thinks fit, state a case on any appeal for the decision of the High Court and shall do so whenever a question of law is involved if either the Commissioner or the appellant applies in writing in that behalf within fifteen days from the decision of the Small Cause Court and deposits such sum as the Small Cause Court thinks necessary to defray the cost of the reference "

Now, to take up rule 15, the provision in sub-clause (1) for notice of intention to appeal to be given to the Commissioner within ten days shows that the appellant cannot be the Commissioner It has been held in *Ahmed Ali & Co* v. *Commissioner, Corporation of Madras*,[1] that

"The language of rule 15 is imperative and the Court of Small Causes would have no jurisdiction to entertain an appeal unless the requirements contained in clauses (*i*) and (*ii*) of rule 15, sub-rule (*a*) are satisfied "

When the provision in clause (*i*) that the appellant must give notice of the appeal to the Commissioner is considered imperative, it follows that the appellant cannot be the Commissioner It would be a repugnant provision if the Commissioner can be an appellant If the Commissioner can also appeal, then there is no provision for notice of such an appeal to the objector When notice of the appeal by the objector is made imperative and provided for it is inconceivable that the Legislature when contemplating an appeal by the Commissioner also provided for no notice to the party that would be affected Without provision for notice to the objector, there can be no valid and effective appeal against him Even though the first part of rule 15 (*a*) is not restrictive of the parties who could appeal when read with clauses (*i*) and (*ii*) there is no room for doubt that the appeal contemplated is by the objector, the party who has to pay the tax The tax has to be paid before the presentation of the appeal (*vide* 15 (*a*) (ii)) Certainly clause (ii) cannot apply to the Commissioner. Thus neither of the imperative provisions for a valid appeal apply to the Commissioner Then again rule 17 already referred to makes a distinction between the appellant and the Commissioner The reference to the High Court may be required by the Commissioner or the appellant plainly indicating that at any rate in rule 17 the appellant refers only to the objector To repeat, though no doubt the first part of rule 15 (*a*) giving the right of appeal by itself imposes no limitation as to the party who may appeal from the decision of the Taxation Appeals Committee, the provisions regarding the appeal read as a whole show that the intention of the Legislature is not to provide an appeal at the instance of the Commissioner. The body of the Taxation Rules as a whole provide opportunities to the objector to get the assessment revised and if the Commissioner can be an appellant, an absurdity would be introduced and anomaly found in complying with the mandatory requirement in rule 15 (*a*) (i) and (ii) It is a recognised principle of construction of statutes that when words found in a statute yield to two interpretations, one leading to repugnance and absurdity or rendering the statute unworkable, and another though restricting the meaning of the words avoiding repugnance, inconsistency, anomaly, etc , the Legislature could be presumed to have intended the latter interpretation Where the plain language of the enactment does not demand it, requirements of consistency and the need to avoid repugnancy and difficulty or absurdity in the working of the Act particularly as here in the imperative provision, call for a restricted interpretation Here from the collocation and juxtaposition of the material words in rules 15 and 17 and the requirements of the rules it follows that the appeal provided for is not one by the Commissioner It may be that this interpretation leaves the Commissioner without a remedy against an adverse order of the Taxation Appeals Committee.

1. (1949) 1 M L J 455

But that is for the Legislature to intervene A right of appeal is not inherent from every decision, it has to be specifically provided for

For these reasons, I do not see any reason to differ from the conclusion of the learned Chief Judge, Court of Small Causes, in his view that the appeals by the Commissioner from adverse orders of the Taxation Appeals Committee are not maintainable under rule 15.

In the result, the Petitions are dismissed

V.K. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM

V. R. Subramaniyam, trading as M/s Manyam & Co, Raja Snow Buildings, Bangalore-20 . *Appellant**

v.

V. N M. N Balasubramaniam Nadar and another .. *Respondents*

Trade and Merchandise Marks Act (XLIII of 1958), sections 9 (1), 11 (a), 12 (1) and 109—" Roji " not a surname or personal name —Marks whether deceptively similar or likely to deceive or cause confusion—Tests—" Roji " and " Raja " used in relating to cosmetics—Not deceptively similar or likely to cause confusion—Application for rectification of register—Onus of proof—High Court hearing appeal under section 109—Powers of—If can interfere with findings of fact

The word " Roji " is not a surname or a personal name, nor is it a derivative from the surname Rosie or is closely similar to the word Rosie Hence registration of the word " Roji " as a trade mark would not be in contravention of section 9 (1) even in the absence of evidence of its acquired distinctiveness

While section 12 (1) prohibits the registration of a mark which is identical with or deceptively similar, section 11 (a) prohibits the use of a mark which is likely to deceive or cause confusion To some extent these two sections cover the same field and there is some overlapping, but they are not identical

A mark will be prohibited whether there is an intention or not, to deceive or cause confusion provided the mark is likely to deceive or cause confusion Confusion may be caused even by telling the truth Confusion may be caused in the purshasers' mind through want of knowledge or ability on his part to distinguish It will have to consider whether the mark is deceptively similar or is likely to deceive or cause confusion Whether or not any degree of resemblance likely to deceive or cause confusion exists is a question for the Court to decide upon evidence in each case What degree of resemblance is likely to deceive or cause confusion in any instance is incapable of definition and the observations of judges upon other and quite different facts are usually of little help

The accepted rules of comparison may be stated as follows (1) the two words should be taken and both of them should be judged by their look and by their sound , (2) the goods to which they are to be applied and the nature and kind of customer who is likely to buy these goods should be considered, (3) all the surrounding circumstances and what is likely to happen if each of the mark is used in a normal way as a trade mark for the goods of the respective owners of the marks should also be considered The marks must be considered as a whole, as the true test is whether the totality of the impression given both orally and visually is such that it is likely to cause mistake, deception or confusion

The words " Raja " and " Roji " do not look alike. They are also not similar by sound In phonetics they are not the same It is not likely that Raja will be mistaken for Roji or *vice versa* during a conversation in person or over the telephone The marks when applied to cosmetics in the normal way are not likely to mislead or cause confusion or deception in the mind of the person who is likely to buy the goods

The plea for rectification of the Register by deletion of the trade mark " Roji " as applied to cosmetics on the ground of contravention of sections 11 (*a*) and 12 (1) because of the earlier registration of " Raja" in respect of the same kind of goods, should therefore fail

In an application for rectification of the Register of trade marks by removal of a trade mark on the ground that the mark violated any of the provisions of the Trade and Merchandise Marks Act, the onus is on the applicant to establish his case for rectification

Section 109 of the Act provides that an appeal shall lie to the High Court from any order or decision of the Registrar under the Act or the Rules made thereunder The appeal is to be heard by a single Judge and the High Court in disposing of an appeal under this section has the power to make any order which the Registrar could make There is no restriction regarding the power of the High Court in disposing of the appeal Hence the contention that the High Court acting under section 109 should be loath to interfere with the findings of facts arrived at by the Registrar cannot be accepted.

*A.A.O No 233 of 1962 23rd July, 1965.

Appeal against the order of the Assistant Registrar of Trade Marks, Madras dated 9th November, 1961, and made in Application for Rectification No MAS. 9.

V. Thiagarajan for *K. P Mahadeva Ayyar*, for Appellant

Subbaraya Ayyar, *Sethuraman* and *Padmanabhan*, for Respondents

The Court delivered the following

JUDGMENT :—This is an appeal preferred by the applicant, V R Subramanyam in Application for rectification No MAS 9 before the Assistant Registrar of Trade Marks, Madras, by removing therefrom the trade mark No 176062 registered in the names of the respondents consisting of the word "Roji" The application was dismissed by the Assistant Registrar of Trade Marks, Madras, holding that the trade mark No 176062 was not made without sufficient cause This appeal is preferred against that order refusing rectification

The business of the applicant was started by the father and predecessor-in-title of the applicant as V Raju Mudaliar and Sons, in the last decade of the last century and was manufacturing and selling perfumery and allied preparations under the trade mark "Raja" The applicant, who established his concern Manyam & Company in 1920 and acted for sometime as distributers for Raja products of Messrs V Raju Mudaliar and Sons, later amalgamated and continued the manufacture and sale of his products under the name and style of Messrs Manyam & Company The trade mark "Raja" in respect of toilets, cosmetics, etc , was lawfully used as an unregistered trade mark for the last several decades and is being used as a registered trade mark for the past many years The trade mark "Raja" was registered on 23rd September, 1943 The applicant stated that he had spent several lakhs of rupees in the advertisment of his trade mark and that the popularity and reputation of the trade mark "Raja" is well established in Madras

The respondent applied for the registration of the trade mark "Roji" on 3rd September, 1956 It was advertised in the Journal on 1st December, 1956 and subsequently the registration was ordered On 24th October, 1960 the present application was filed for rectification of the register by removal of the mark "Roji" from the register The ground alleged for rectification was that the name was registered in the books in violation of sections 9, 11 and 12 of the Trade and Merchandise Marks Act, 1958

The respondent denied that the registration of the name "Roji" is prohibited under sections 9, 11 and 12 of the Act He also contended that the mark that was registered was not identical with or deceptively similar to the trade mark registered in the name of the petitioner He also contended that the petition for rectification of the register was belated and not *bona fide* and that the applicant had no *locus standi* to ask for the rectification of the register

The Assistant Registrar of Trade Marks found that the applicant had *locus standi* to prefer the application He also found that the goods for which the trade mark was registered were the same and were of the same description as that of the applicant He found that there was no contravention of sections 9, 11, 11 (*a*) or 12 (1) of the Act and that the mark was not liable to be removed from the register.

It is admitted that the applicant was trading with the registered name "Raja" and that that mark has earned a reputation in the market It is also admitted that considerable sums of money had been spent by the applicant for advertisement of his trade mark "Raja" It is also not denied in this appeal that the applicant is entitled to maintain the application for rectification of the register

Mr V Thiagarajan, learned Counsel for the appellant, contended that the registry of the name "Roji" is contrary to the provisions of sections 9 (1), 11 (*a*) and 12 (1) of the Act and it is liable to be removed from the register. Section 9 (1) of the Act provides that a trade mark shall not be registered in Part 'A' of the register

unless it contains or consists of at least one of the essential particulars given in sub-sections (*a*) to (*e*) Sub-section (*d*) prohibits the use of a word which is a geographical name or a surname or a personal name A geographical name, a surname or a personal name cannot be registered except upon evidence of its distinctiveness. It is the contention of the learned Counsel for the appellant that the name "Roji" is a surname and, as it has not acquired any distinctiveness, it should not be registered. Mr Thiagarajan was unable to refer to any book of reference, where "Roji" is mentioned as a surname or a personal name The Assistant Registrar was of the view that "Roji" was not a surname or a personal name Learned Counsel for the appellant was unable to challenge this finding of the Assistant Registrar, but submitted that "Roji" is a close resemblance of the surname Rosie and as such registration of "Roji" should be prohibited This contention is raised for the first time during the hearing of the appeal It was not suggested before the Assistant Registrar that the word "Roji" is a derivative from Rosie Nor has this point been raised in the memorandum of grounds Apart from this objection, I am unable to accept the contention that "Roji" is a derivative from the surname Rosie or that it is so closely similar to the word Rosie. The contention that "Roji" is a surname and the registration is in contravention of section 9 (1) cannot, therefore, be accepted

The next contention is that the registration is in contravention of section 11 (*a*) and 12 (1) of the Act Section 11 (*a*) prohibits the registration of a mark, the use of which would be likely to deceive or cause confusion Section 12 (1) prohibits the registration of a trade mark in respect of goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods Thus, while section 12 (1) prohibits the registration of a mark, which is identical with or deceptively similar, section 11 (*a*) prohibits the use of a mark which is likely to deceive or cause confusion The words *deceptively similar* are defined in section 2 (*d*) as follows .—

"A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion "

To some extent these two sections cover the same field and there is some over-lapping, but they are not identical In considering the words *likely to deceive or cause confusion*, Lord Denning in *Parker-Knoll, Limited* v *Knoll International Limited*[1] observed as follows :—

" It is not necessary that it should be intended to deceive or intended to cause confusion You do not have to look into the mind of the user to see what he intended It is its probable effect on ordinary people which you have to consider No doubt if you find that he did intend to deceive or cause confusion, you will give him credit for success in his intentions You will not hesitate to hold that his use of it is likely to deceive or cause confusion But if he had no such intention, and was completely honest, then you will look carefully to see whether it is likely to deceive or cause confusion before you find him guilty of infringement.

Secondly ' to deceive ' is one thing To 'cause confusion ' is another The difference is this : When you deceive a man, you tell him a lie You make a false representation to him and thereby cause him to believe a thing to be true which is false You may not do it knowingly, or intentionally, but still you do it, and so you deceive him But you may cause confusion without telling him a lie at all, and without making any false representation to him Yoy may indeed tell him the truth, the whole truth and nothing but the truth, but still you may cause confusion in his mind, not by any fault of yours, but because he has not the knowledge or ability to distinguish it from the other pieces of truth known to him or because he may not even take the trouble to do so "

Thus, a mark will be prohibited whether there is an intention or not to deceive or cause confusion provided the mark is likely to deceive or cause confusion Confusion may be caused even by telling the truth Confusion may be caused in the purchaser's mind through want of knowledge or ability on his part to distinguish It will have to be considered whether the mark is deceptively similar or is likely to deceive or cause confusion Whether or not any degree of resemblance likely to deceive or cause confusion exists is a question for the Court to decide upon evidence in each case What degree of resemblance is likely to deceive or cause confusion

1 (1962) R P.C 265, 273.

in any instance is incapable of definition, and the observations of judges upon other and quite different facts are usually of little help The accepted rules of comparison may be stated as follows —

> "(i) The two words should be taken and both of them should be judged by their look and by their sound, (ii) The goods to which they are to be applied and the nature and kind of customer who is likely to buy these goods should be considered, (iii) all the surrounding circumstances and what is likely to happen if each of the marks is used in a normal way as a trade mark for the goods of the respective owners of the marks should also be considered."

The marks must be considered as a whole, as the true test is whether the totality of the impression given both orally and visually is such that it is likely to cause mistake, deception or confusion These three tests may be applied to the present case The two words may be taken together and judged by their look and by their sound The words "Raja" and "Roji" do not look alike They are also not similar by sound In phonetics they are not the same It is not likely that "Raja" will be mistaken for "Roji" or *vice versa* during a conversation in person or over the telephone. Secondly, the goods to which the mark is to be applied and the nature and kind of customer who is likely to buy these goods should be considered The goods to which the mark is to be applied are the same in both the cases. The kind of customer, who is to buy these goods, that is cosmetics, is not likely to mistake one mark for the other, as there is no great similarity between the two marks Thirdly, taking all the surrounding circumstances if both marks are used in a normal way, it cannot be said that a person is likely to be misled or there will be confusion or deception in the mind of the person, who is likely to buy these goods Apart from these rules for comparison, several other tests are also prescribed by various decisions The Supreme Court in *Amritdhara Pharmacy* v *Satyadeo Gupta*[1], observed as follows .—

> "The Act does not lay down any criteria for determining what is likely to deceive or cause confusion. Therefore, every case must depend on its own particular facts, and the value of authorities lies not so much in the actual decision as in the tests applied for determining what is likely to deceive or cause confusion In cases in which the tribunal considers that there is doubt as to whether deception is likely, the application should be refused A trade mark is likely to deceive or cause confusion by its resemblance to another already on the Register if it is likely to do so in the course of its legitimate use in a market where the two marks are assumed to be in use by traders in that market In considering the matter, all the circumstances of the case must be considered . . . For deceptive resemblance two important questions are
>
> (1) who are the persons whom the resemblance must be likely to deceive or confuse, and
>
> (2) what rules of comparison are to be adopted in judging whether such resemblance exists As to confusion, it is perhaps an appropriate description of the state of mind of a customer who on seeing a mark thinks that it differs from the mark on goods which he has previously bought, but is doubtful whether that impression is not due to imperfect recollection "

Applying these tests it has to be stated that the mark is not likely to deceive or confuse the person, who would ordinarily purchase the goods A large number of decisions were cited on either side in support of their contentions, where similar words were construed It is unnecessary to refer to them as the authorities are helpful only in formulating the tests for determining the question whether the mark is likely to deceive or cause confusion Kerly on Trade Marks, at page 429 (Eighth edition) has given a long list of words that were contrasted in various decisions. As the decisions are based on the facts of each case, they are not helpful in deciding this case.

It was next contended on behalf of the respondent that in an application for rectification of the registry the onus is on the applicant to establish his case for rectification, whereas in an application for registration of a trade mark the onus is on the applicant to satisfy the Registrar that the trade mark applied for is not likely to deceive or cause confusion In Halsbury's Laws of England (Third Edition) volume 38 at page 571, the principle is stated as follows —

> "The principles on which the Court acts in the case of an application to rectify the register on the ground that a mark is not a properly registrable mark are the same as in the case of an application to register The burden of proof, however, is changed, and it is for the applicant for rectification to show that the mark should not be on the register "

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1. (1963) 2 S C R 484.

In this case the mark of the respondent was registered, and the burden is on the appellant to prove that the mark violated any of the provisions of the Act and should be removed On a consideration of the facts proved I do not think the appellant has discharged the onus of proving that there is a likelihood of deception or confusion amongst the purchasers of the goods.

It was next contended by the learned Counsel for the respondent that the appellate Court will be loath to interfere with the findings of fact arrived at by the Registrar of Trade Marks The views of English Courts vary considerably as to when the Registrar's discretion may be overruled It is summarised by Halsbury's Laws of England (Third edition), volume 38 at page 539 as follows —

"The Court and the House of Lords have a similar discretion, but are very reluctant to interfere unless the Registrar is clearly wrong"

In *Union Carbide and Carbon Corporation's Application to Register a Trade Mark*[1] the learned Judge stated the position as follows —

"If I were satisfied that in arriving at that decision the Hearing Officer had observed the right approach, having regard to the language of the statute and the guidance given by the decided cases, the mere fact that his conclusion would not necessarily be that at which I myself would have arrived without his assistance is no reason whatever for interfering with his decision Indeed, I think it would be true to say that, even if I came to the conclusion, as I think I might that his conclusion was fanciful, and indicated failure to appreciate the unsubstantial nature of the objection posed, nonetheless except upon the footing that in exercising his discretion the Hearing Officer had failed to exercise it judicially I should not be justified in interfering with his conclusion"

In my view the law expounded by the learned Judge that unless the Hearing Officer had failed to exercise his discretion judicially, even though the conclusion was fanciful, the appellate Court will not interfere may not be applicable to a Court hearing an appeal under section 109 of the Trade and Merchandise Marks Act, 1958. Section 109 provides that an appeal shall lie to the High Court from any order or decision of the Registrar under the Act or the Rules made thereunder The appeal is to be heard by a single Judge of the High Court, and the High Court in disposing of an appeal under this section shall have the power to make any order which the Registrar could make under this Act There is no restriction regarding the power of the High Court in disposing of the appeal The corresponding section in the English Trade Marks Act, 1938, is section 52, which provides that in any appeal from the decision of the Registrar, the Court shall have and exercise the same discretionary powers as under this Act or conferred upon the Registrar Dealing with the contention that the High Court should not lightly interfere with the order of the Registrar, Jagadisan, J, in Appeal Against Order No 266 of 1961, pointed out that there was no presumption that the Registrar by virtue of his office had experience in the area of trade mark claimed and the law was necessarily right The learned Judge further stated

"The Registrar of Trade Marks does not occupy a better position than subordinate Civil Court."

This perspective of approach was affirmed by the Bench in *Chinnikrishnan Chettiar* v *Sri Ambal & Company*[2] It was pointed out by the Bench that the duty was that of the Court, and the Court, alone, and it could not shirk that duty by treating the conclusions of the Registrar as sacrosanct unless it could be shown that they were manifestly opposed to law, or erroneous on the face of the record In view of the decision of the Bench, the English decision may not be applicable in disposing of an appeal under section 109 of the Act Learned Counsel for the respondent also referred to some decisions of single Judges of this Court where it was held that the appellate Court will be loath to interfere with the order of the Registrar in appeal. But in view of the decision of the Bench of this Court in *Chinnikrishna Chettiar* v. *Sri Ambal & Company*[2], it is now settled that the power of the appellate Court is not in any way restricted and that the order of the Registrar need not be treated as sacrosanct The appellate Court will of course take into consideration the view of the Registrar in coming to a decision on appeal The contention of the learned

1 69 R.P.C. 306, 308. 2 (1964) 2 M.L.J. 206.

Counsel for the respondent that the High Court should not lightly interfere with the order of the Registrar in appeal cannot therefore be accepted

On a consideration of all the facts I agree with the findings of the Registrar that the mark "Roji" is not deceptively similar or likely to deceive or cause confusion amongst the purchasers of the goods The appeal is dismissed with costs

V K ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE P S KAILASAM

Kutti Nadar and others .. *Appellants**

v.

Swamikutty Nadar and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (2)—Execution of decree—Limitation—Six year period when available—Lower Court's decree registered but not appellate Court's decree—Execution of appellate decree—Limitation

When a Second Appeal to the High Court of Travancore-Cochin was pending, the Indian Registration Act and the Indian Limitation Act came into force in the State of Travancore-Cochin on 1st April, 1951 Thereafter the Second Appeal was dismissed confirming the decrees of the Courts below The lower Courts' decrees were automatically registered under the Travancore Registration Act But the decree in Second Appeal was not registered though by virtue of section 6 of the Part B States Laws Act III of 1951 the High Court of Travancore-Cochin was bound to have registered the decree even after the Indian Acts had come into force In the circumstances,

Held, the period of limitation available for the execution of the appellate decree under Article 182 of the Limitation Act was only 3 years from the date of the appellate decree as the appellate decree was not in fact registered though the High Court of Travancore-Cochin was bound to have registered the decree

The only decree that subsists after the appeal is the appellate Court's decree and hence the fact the lower Court's decrees were registered would not make the extended period of 6 years under Article 182 available to the execution of the appellate unregistered decree

Appeals against the Decrees of the Subordinate Judges of Padmanabhapuram and Nagercoil, dated 18th January, 1962 and 17th February, 1960 and A S. No. 330 of 1959, passed in C M A No 92 of 1961

M S Dhanukodi Pillai, V Shanmugham and *S Padmanabhan,* for Appellants

S Padmanabhan and *P Ananthakrishnan Nair,* for Respondents.

The Court delivered the following

JUDGMENT —The same question of law arises in both the appeals and they may be dealt with together In the suit out of which Civil Miscellaneous Second Appeal No 100 of 1962, arises a decree was passed by the trial Court on 14th October, 1947 The trial Court decree was registered under the provisions of the Travancore Registration Act An appeal against the decree was dismissed on 21st January, 1949 The appellate Court's decree was also registered A Second Appeal to the High Court of Travancore-Cochin was filed in 1950 When the Second Appeal was pending, the Indian Registration Act and the Indian Limitation Act came into force in the State of Travancore-Cochin on 1st April, 1951 After the coming into force of the Indian Acts, the High Court dismissed the Second Appeal confirming the decree of the Courts below The decree in Second Appeal was not registered Now it is contended on behalf of the appellants in Civil Miscellaneous Second Appeal No 100 of 1962 and the respondents in Civil Miscellaneous Second Appeal No 86 of 1960 that, as under the Travancore Registration Act a fee was compulsorily leviable along with the plaint and the decree was automatically registered, it should be taken that though the decree passed in the Second Appeal was not registered, the time for limitation should be taken as six years from the date of the appellate decree Learned Counsel submitted that under section 6 of the Part B States Laws Act III of 1951, the previous operation of any law repealed or anything duly done or suffered thereunder, or any right, privilege, obligation or liability acquired or incurred under any law so repealed were not affected The

* A A A.O Nos 100 of 1962 and 86 of 1960 2nd August, 1965.

contention of the learned Counsel was that because of this enabling provision, the High Court of Travancore-Cochin was bound to register the appellate decree, even though the Indian Acts had come into force It was also pointed out that the Second Appeal was preferred before the Indian Acts came into force and the necessary registration fee had also been paid Section 6 of the Part B States Laws Act III of 1951 would have enabled the High Court to register the appellate decree and the decree-holder to ask the Court to register the decree in spite of the Indian laws having come into force But this was not done The Indian Limitation Act provides a period of six years if the decree is registered, otherwise the period available is only three years Even though it is made out that the High Court failed to register the decree which it was bound to and the appellant in Civil Miscellaneous Second Appeal No 100 of 1962, was entitled to have the appellate decree registered, the decree in fact remained unregistered The extended period of six years is available only if the appellate decree is registered

It was contended that the decree which is sought to be executed is the trial Court's decree and as the trial Court's decree is registered, a period of six years from the date of the appellate decree should be taken as the period of limitation. This contention cannot be upheld, in view of the decisions of the Privy Council and the Supreme Court holding that the only decree that subsists after the appeal is the appellate Court's decree In *Commissioner of Income-tax, Bombay* v *M/s. Amritlal Bhogilal & Co* [1], Gajendragadkar, J, as he then was, summed up the position thus

"There can be no doubt that, if an appeal is provided against an order passed by a Tribunal the decision of the appellate authority is the operative decision in law If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision, that is effective and can be enforced In law the position would be just the same even if the appellate decision merely confirmed the decision of the tribunal As a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement"

Rajagoplan, J, in Civil Miscellaneous Second Appeal No 92 of 1959, had to consider a case in which the facts were similar to the case under consideration The learned Judge observed as follows.—

"I am clearly of the view that for that purpose the decree of the trial Court merged in the decree of the appellate Court The only decree in the suit is the decree that the appellate Court granted, and that alone is the decree that is thereafter capable of execution In this case the decree copy of which was registered within the meaning of Article 182 merged in the decree of the Appellate Court which was not registered The merger obviously did not impart to the decree of the Appellate Court the status of a registered decree which the merged decree had The decree of the trial Court in this case was *non est* in law for purposes of columns (1) and (2) of Article 182 of the Limitation Act, and the fact that it was registered ceased to have any significance for purposes of applying the period of limitation prescribed by column (2) of Article 182 The period of limitation that applied to the decree capable of execution and factually under execution in this case was only three years as that decree was not registered"

I am in respectful agreement with the view expressed by the learned Judge

In Civil Miscellaneous Second Appeal No 86 of 1960, the decree by the trial Court was on 15th November, 1950, and by the appellate Court on 15th June, 1955, after the Act came into force on 1st April, 1951 In both the cases, the appellate enforceable decrees were not registered, and the execution petitions were filed three years after the date of the appellate decree The time available is only three years, and as the petitions were filed more than three years after the date of the appellate decrees, the execution petitions are out of time

In the result, Civil Miscellaneous Second Appeal No 100 of 1962, is dismissed and Civil Miscellaneous Second Appeal No 86 of 1960, is allowed There will be no order as to costs Leave granted in both.

V K ——— *Order accordingly.*

1 (1958) S C J 1007 (1958) 2 An W R 174. (1959) S C R 713. (1958) 2 M L J. (S C) 174. (1958) 34 I T R. 130:

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE K. VEERASWAMI

Narayana Padayachi .. *Appellant**

v

Sundaralingam and another .. *Respondents*

Civil Procedure Code (V of 1908), section 100—Finding of fact—Interference in Second Appeal

Madras Cultivating Tenants Protection Act (XXV of 1955), section 3 (1), (2) (b) and (4) (a)—Cultivating tenant—When ceases ' altogether to cultivate land ' within the meaning of section 3 (2) (b) as to lose protection under section 3 (1)—Eviction of tenant falling within purview of section 3 (2) (b)—Proper forum

A finding as to whether during the absence of a cultivating tenant his sons were as a matter of fact cultivating the lands, is one of fact and the factual finding in respect of it cannot be disturbed in Second Appeal.

Sub-section (1) of section 3 of the Madras Cultivating Tenants Protection Act affords protection to cultivating tenants from eviction at the instance of a landlord notwithstanding a decree or order of a Court But this protection is subject to the provisions of sub-section (2) of section 3 which details the circumstances in which a cultivating tenant may not be entitled to protection from eviction, but may be exposed to liability of eviction Clause (*b*) of section 3 (2) among other things says that a cultivating tenant who has *altogether ceased to cultivate the land* will not be entitled to the benefit of section. 3 (1). Clearly this expression *has altogether ceased to cultivate the land* has reference not merely to the physical act of stopping cultivation but to an intention never to revert to cultivation on the land. This intention has to be gathered from the facts and circumstances in each case including the fact of actual cessation of cultivation over a particular period But the fact that the cultivating tenant had ceased to cultivate the land for a particular period (2) years in the instant case) would not disentitle the cultivating tenant to the protection of section 3 (1) unless the Court also finds that from such cessation an intention to abandon cultivation for ever, on the part of the tenant, could be inferred.

Eviction of a cultivating tenant who falls within the purview of section 3 (2) (*b*) can only be by an application to the Revenue Divisional Officer and not by execution of a decree in a civil Court. A combined reading of sub-sections (1), (2) and (4) (*a*) of section 3 clearly leads to the result that if a cultivating tenant falls within the purview of sub-section (2) of section 3 the only remedy of the landlord notwithstanding a decree of Court is to apply to the Revenue Divisional Officer for eviction and not to resort to the civil Court for eviction by way of an execution of a decree

Appeal and Memorandum of Objections therein against the order of the Subordinate Judge of Mayuram, dated 18th December, 1963, and made in Civil Miscellaneous Appeal No 26 of 1963, preferred against the order of the Additional District Munsif of Mayuram, dated 19th April, 1963, and made in Execution Petition No. 564 of 1961 in Original Suit No 244 of 1951.

K.S Naidu, for Appellant.

A. Sundaram Iyer, for Respondents.

The Court made the following

ORDER.—This appeal must succeed on the short ground of jurisdiction. Before dealing with it, the material facts may be noticed The appellant was let into possession by the respondents into an extent of 54 cents of dry land under an agricultural tenancy The respondents sued in Original Suit No 244 of 1951 on the file of the Court of the District Munsif at Mayuram in ejectment, which ended in a compromise decree, dated 17th April, 1952 This decree provided that the appellant should vacate and deliver vacant possession after five years, that is, on 17th April, 1957. The respondents filed on 13th December, 1961 the execution petition out of which this appeal arises Execution of the compromise decree was resisted on the grounds (i) the appellant was a cultivating tenant (ii) he was entitled to protection under the provisions of the Kudiyiruppu Act and (iii) the petition was barred by limitation The executing Court held on the first point against the appellant, on the second point it found that he was entitled to protection in respect of only seven cents of land and on the third the petition was barred by limitation The execution petition was therefore dismissed On appeal by the respondents, the lower appellate Court disagreed with the trial Court and found that during the absence of the appellant during a period of two years, his sons were not proved to have cultivated the land and that in view of this the appellant had ceased to cultivate the land for two years within the meaning of section 3 (2) (*b*) of the Madras

*A.A.A O. No. 35 of 1964. 22nd July, 1965.

Cultivating Tenants Protection Act, 1955 On the second point, the lower appellate Court concurred with the finding of the executing Court, but, on the last point, the lower appellate Court again disagreed with the Court below it and held that the execution petition was not barred On that view, the lower appellate Court ordered eviction of the appellant from the land except in respect of seven cents.

Before this Court, Mr. K S Naidu, learned Counsel for the appellant has not canvassed the view of the lower Court on limitation, but has confined his argument to three points (i) the general trend of the evidence for the appellant established that his sons did as a matter of fact cultivate during his absence of two years, (ii) even assuming that this was not so there could be no question of automatic eviction and the respondents should establish that the appellant had evinced an intention to abandon cultivation altogether and (iii) in any case, even on the assumption that the appellant came within the purview of section 3 (2) (*b*), the remedy of the respondents lay with the Revenue Divisional Officer and the civil Court will have no jurisdiction to evict the appellant by execution of the decree

The first point of Mr. K S Naidu is one of fact and the factual finding in respect of it cannot be disturbed in Second Appeal. Apart from that, on a perusal of the relative evidence for the appellant, I am not satisfied that its appreciation by the lower appellate Court suffered from any misdirection or misappreciation On the second point the appellant appears, however, to be well-founded Sub-section (1) of section 3 affords protection to cultivating tenants from eviction at the instance of a landlord notwithstanding a decree or order of a Court. But this protection is subject to the provisions of sub-section (2) which details circumstances in which a cultivating tenant may not be entitled to protection from eviction, but may be exposed to liability of eviction Clause (*b*), among other things, says that a cultivating tenant who *has altogether ceased to cultivate the land* will not be entitled to the benefit of sub-section (1) Clearly this expression *has altogether ceased to cultivate the land* has reference not merely to the physical act of stopping cultivation but to an intention never to revert to cultivation on the land This intention has to be gathered from the facts and circumstances in each case including of course the fact of actual cessation of cultivation over a particular period or more. Kailasam, J., in Civil Revision Petitions Nos 2220 to 2231 of 1959 has expressed a similar view as to the effect of those words in section 3 (2) (*b*) and Venkatadri, J. has concurred with it in Civil Revision Petition No 1034 of 1961, *Dharmayya Udayar* v *Mohammed Yunas Rowther*[1]. With respect, I agree that this is the correct view to take.

The lower appellate Court observed that section 3 (2) (*b*) was satisfied because the tenant had admittedly ceased to cultivate the land for two years and had not substantiated by proof that during his absence during that period the land was subject to any cultivation by any members of his family This appears to be a misdirection on its part as to the scope and effect of section 3 (2) (*b*). The Court below failed to appreciate that what it has to look for is the intention on the part of the tenant to abandon cultivation for ever and never revert to it In fact beyond quoting section 3 (2) (*b*) it does not give a precise finding that the appellant had as a matter of fact altogether ceased to cultivate the land in the sense this Court has interpreted that provision.

The matter does not stand there The appellant's last point also seems to my mind to be unanswerable, though of course it had not been taken in that precise form in the lower appellate Court It is argued that the effect of sub-section (1) is to afford immunity from eviction, but subject to sub-section (2). But this does not mean that if a cultivating tenant falls under any of the provisions of sub-section (2), he ceased to be a cultivating tenant and that, therefore, eviction of a cultivating tenant who falls within the purview of section 3 (2) (*b*) can only be by an application to the Revenue Divisional Officer and not by execution of a decree. Mr. A Sundaram Iyer for the respondents seeks to meet the argument by contending that since the protection under sub-section (1) is subject to sub-section (2) and if a cultivating tenant falls within the purview of sub-section (2) and, therefore, is

1. C.R.P. No. 1034 of 1961.

exposed to the liability of eviction, the embargo against eviction under sub-section (1) is lifted so that there is no bar to execution of the decree for eviction Learned Counsel adds that the ground of eviction here is not that the appellant falls within the purview of section 3 (2) (*b*), but there is a decree for eviction which can be executed But the last aspect presented by Mr Sundaram Iyer overlooks the scope of sub-section (4) (*a*) of section 3 which is confined to the character of the cultivating tenant and not to the ground of eviction

Clause (*a*) of this sub-section says that a landlord seeking to evict a cultivating tenant who falls within the purview of sub-section (2) shall make an application to the Revenue Divisional Officer, whether or not there is an order or a decree of a Court for eviction of such a cultivating tenant If a cultivating tenant answers the description of one under sub-section (2), sub-section (4) clause (*a*) unmistakably directs that an application for eviction shall lie only to the Revenue Divisional Officer I do not think that this sub-clause is in conflict with sub-sections (1) and (2) of section 3 If a cultivating tenant falls within the purview of sub-section (2), the only result is that the embargo against eviction is lifted, and it has no relation to the jurisdiction of forum for eviction Sub-section (1) merely says that a cultivating tenant shall be protected from eviction notwithstanding a decree or order of a Court Further I do not think that sub-section (4) (*a*) by itself achieves the purpose of sub-section (1) for sub-section (4) (*a*) is confined to a particular category of cultivating tenants who fall within the purview of sub-section (2) and will not by itself extend protection from eviction in respect of cultivating tenants who do not fall within the purview of sub-section (2) Quite apart from section 6, the effect of which does not fall to be considered in this case, a combined reading of sub-sections (1), (2) and (4) (*a*) of section 3 clearly leads to the result that if a cultivating tenant falls within the purview of sub-section (2), the only remedy of the landlord notwithstanding a decree of Court is to apply to the Revenue Divisional Officer for eviction and not to resort to the civil Court for eviction by way of execution of a decree.

The appeal is allowed and the execution petition will stand dismissed. The parties will bear their own costs throughout.

On the view I have taken, the memorandum of objections is dismissed but with no costs.

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE K. VEERASWAMI.

Ramaswamy Goundar and another .. *Appellants**

v.

Baghyammal and others .. *Respondents.*

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), sections 4 and 28—Scope of section 28—If overrides section 39 of the Transfer of Property Act (IV of 1882) in its application to Hindu wife in respect of her maintenance

Transfer of Property Act (IV of 1882), section 39— If overridden by section 28 of the Hindu Adoptions and Maintenance Act in its application to a Hindu wife—Effect of section 39.

There is no doubt that where an amending and codifying law deals with a certain subject it must be taken that the law so amended and codified is exhaustive of the subject to the extent to which it has dealt with it.

But in the case of the Hindu Adoptions and Maintenance Act, 1956 (referred to shortly as the 1956 Act herein) this Act itself contains an interpretation section which is section 4 In view of this section and its effect it must be held that the mere fact that section 28 specifically deals with the effect of transfer of property on right to maintenance so far as it relates to dependents, does not necessarily mean that the right of a wife (who is not a dependent as defined in the 1956 Act) in case of a transfer falling within the purview of section 39 of the Transfer of Property Act has been abrogated. Not only is section 39 of the Transfer of Property Act not within the purview section 4 (*a*) of the 1956 Act but is also not inconsistent with any of the provisions of the 1956 Act so far as a wife is concerned. It cannot therefore be contended that section 28 of the 1956 Act has overridden section 39 of the

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* S.A. No. 1080 of 1963. 25th June, 1965.

Transfer of Property Act in its application to a Hindu wife in respect of her maintenance Section 28 does not purport to deal with the wife's right and is only confined to dependents and is therefore not exhaustive and a Hindu wife is still entitled to rely on section 39 of the Transfer of Property Act which is entirely left unaffected by the 1956 Act.

The effect of section 39 of the Transfer of Property Act is that if an alienation is made of the husband's property with notice of the right of his wife to maintenance, the alienation will not affect her right in any way. In other words she can proceed against the alienated property as if it had not been alienated to the extent necessary If that were so, nothing stands in the way of the Court creating a charge over the alienated property

However, it will be unreasonable to create a charge over the alienated property far out of proportion to the quantum of maintenance decreed in favour of the wife and it is but equitable that in the first instance she should be made to pursue the properties still in the hands of her husband and it is only when it is necessary for her to do so she should be permitted to proceed against the alienated property.

Appeal against the decree of the Subordinate Judge, Salem, in Appeal Suit No. 58 of 1963, preferred against the Decree of the District Munsif (Additional) of Salem in Original Suit No 912 of 1961.

R Ramamurthy Ayyar, for Appellants

R. Vedantham, for first Respondent.

The Court delivered the following

JUDGMENT.—The third and fourth defendants are the appellants from a decree of the Subordinate Judge of Salem by which he confirmed the decree of the trial Court for maintenance in favour of the plaintiff with a charge over the plaint A and B Schedule properties except for the modification he made of the quantum of maintenance On 11th February, 1959, the first defendant who is the husband of the plaintiff, sold the plaint A Schedule properties to the appellants for a consideration of Rs 22,500 On 16th December, 1959, the plaintiff sued her husband for maintenance and for a charge over the A and B Schedule properties in respect of it.

Mr. Ramamurti Iyer contends that the Courts below were wrong in granting a charge in favour of the plaintiff over the plaint A Schedule properties. He says that the Hindu Adoptions and Maintenance Act, 1956, which is an amending and codifying law on the subject of maintenance, lays down the entire law as to that matter so that the right to follow property alienated by a person liable to maintain dependents out of a deceased's properties, with notice on the part of the alienees, is now confined to dependents as defined in that Act, and that, therefore, a wife who is not a dependent under the Act, is not entitled to the benefit of section 39 of the Transfer of Property Act any longer. On that basis he argues that the charge given by the Courts below in favour of the plaintiff over the A Schedule properties cannot be maintained.

The Hindu Adoptions and Maintenance Act, 1956 is no doubt an Act to amend and codify the law relating to adoptions and maintenance among Hindus Chapter III of this Act contains provisions relating to maintenance of wife, widowed daughter-in-law, children, aged parents and certain categories of persons included in the definition of dependents The chapter also provides for the determination of the amount of maintenance and as to when maintenance will be a charge on the estate of a deceased and the effect of transfer of property on right to maintenance. Section 18 deals with a wife's right of maintenance and says that a Hindu wife, whether married before or after the commencement of the Act, shall be entitled to be maintained by her husband during her lifetime This provision is of course subject to the other provisions of the section Under section 19 a widowed daughter-in-law is entitled to be maintained from the estate of her husband or her father or mother as the case may be. Section 21 mentions certain categories of persons as coming within the definition of dependents and a wife is not one such person Section 22 provides for maintenance of dependents as defined by section 21. Section 28 says:

> "Where a dependent has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous, but not against the transferee for consideration and without notice of the right"

This section has been framed on the pattern of section 39 of the Transfer of Property Act.

Being an amending and codifying law, says Mr. Ramamurti Iyer, the Act should be taken to be exhaustive on the subject-matter and applying this principle, he says, section 28 contains the entire law relating to the effect of transfer of property in relation to right to maintenance He deduces, therefore, that since this section covers only dependents and should be taken to be exhaustive, a wife is not entitled to follow up the property of her husband in case it is alienated, be it with notice of her right to maintenance Learned Counsel does not dispute that if it were not so, section 39 of the Transfer of Property Act would cover the case of a wife

As to the principle of construction of an amending and codifying law, there cannot be any doubt. The Privy Council in *Narendranath Circar* v *Kamalabasini Dasi*[1] quoting from *Bank of England* v. *Vaghan Brothers*[2] stated.

"If a statute, intended to embody in a code a particular branch of law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions . . . "

The Supreme Court accepted this principle in *Satyabrata Ghose* v. *Mugneeram Bangar & Co. and another*[3] as the correct one and observed :

"It must be held also that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English Law '*de hors*' these statutory provisions "

There is therefore no doubt that where an amending and codifying law deals with a certain subject it must be taken that the law so amended and codified is exhaustive of the subject to the extent to which it has dealt with it But the Hindu Adoptions and Maintenance Act, 1956, itself contains an interpretation section, which is section 4 That provides for the overridding effect of the Act and says .

"Save as otherwise expressly provided in this Act,

(*a*) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act,

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

The first part deals only with any text, rule or interpretation of Hindu Law or any custom or usage as part of that law which does not touch upon the effect of transfer of property on right to maintenance Further, this part of the section will have application only if any point covered by any text, rule or interpretation of Hindu Law or any custom or usage has been dealt with by the Act. The second part of the section relates to any other law but will have application only in case of such a law being inconsistent with any of the provisions contained in the Act In view of this section and its effect, I am of the view that the mere fact that section 28 specifically deals with the effect of transfer of property on right to maintenance so far as it relates to dependents does not necessarily mean that the right of a wife in case of a transfer falling within the purview of section 39 of the Transfer of Property Act has been abrogated Not only is section 39 of the Transfer of Property Act not within the purview of clause (*a*) of section 4 but is also not inconsistent with any of the provisions of the Act so far as a wife is concerned I am unable to accept the contention of Mr Ramamurti Iyer, therefore, that section 28 of the Hindu Adoptions and Maintenance Act, 1956 has overridden section 39 of the Transfer of Property Act in its application to a Hindu wife in respect of her maintenance As I said section 28 of the 1956 Act does not purport to deal with the wife's right and is only confined to dependents and is, therefore, not exhaustive and a Hindu wife is still entitled to rely on section 39 of the Transfer of Property Act which is entirely left unaffected by the 1956 Act

1 (1896) L R 23 I A. 18 6 M L J. 71 : I.L R. 23 Cal 563, 573 (P C).
2. L R. (1891) A C 107.
3 (1954) S C J 1 : (1954) 1 M.L.J. 41 : (1954) S C R 310, 319.

The finding of the Courts below in this case is that the appellants purchased the property with notice of the right of the plaintiff to maintenance Mr Ramamurti Iyer contends that se tion 39 by itself does not create a charge and as section 28 of the 1956 Act is exhaustive she is not entitled to a charge He argues that all that the plaintiff can do is to follow the A Schedule properties and that she is not entitled to a charge on that account I have already held that section 28 does not deal with the wife's right and is, therefore, not exhaustive in that sense. Apart from that, the argument of Mr Ramamurti Iyer overlooks the effect of section 39 which is that if an alienation is made of the husband's property with notice of the right of his wife to maintenance, the alienation will not affect her right in any way. In other words, she can proceed against the alienated property as if it had not been alienated to the extent necessary. If that were so, nothing stands in the way of the Court creating a charge over the alienated properties. I hold, therefore, that the Courts below were right in their view that it was open to them to create a charge over the alienated properties in favour of the plaintiff for her maintenance.

The next argument of Mr Ramamurti Iyer is that even assuming that the plaintiff was entitled to a charge, it will be unreasonable to create a charge over properties far out of proportion to the quantum of maintenance decreed in favour of the plaintiff and that it is but equitable that in the first instance the plaintiff should be made to pursue the properties still in the hands of her husband and it is only when it is necessary for her to do so, she be permitted to proceed against the A Schedule properties I think there is force in both the contentions The Courts below have not ascertained the extent of income from the A and B Schedule properties and whether the charge should not be limited to such extent of the A and B Schedule properties as the income from which would be sufficient to meet the maintenance decree in favour of the plaintiff I think on this ground the decrees for granting a charge in favour of the plaintiff should be set aside and the matter be remitted to the trial Court in order that it may find out the extent of properties in the A and B Schedule properties the income from which will be just sufficient to satisfy the maintenance fixed for the plaintiff and grant a charge in her favour over only that extent of properties in the A and B Schedules If the income from the B Schedule property is sufficient to meet the maintenance granted to the plaintiff, then of course no question of creating a charge over the A Schedule property will arise So far as the decree for past maintenance is concerned, I think it reasonable that in the first instance it should be executed against the B Schedule properties and it is only when the decree is still not satisfied, the plaintiff can proceed against the A Schedule properties This will be provided for in the revised decree to be passed by the trial Court The Second Appeal is allowed in those terms But there will be no order as to costs. Pending the trial Court passing a revised decree, the appellants will not alienate the properties covered by Exhibit B-1. The Court-fee paid on the Memorandum of Second Appeal will be refunded

V.K. *Appeal allowed.*

[END OF VOLUME (1966) II M.L.J. (REPORTS).]

THE LATE Dr. C. P. RAMASWAMI AIYAR.

A star of the most wonderful effulgence has disappeared from our midst Full of years and honours, Dr C P Ramaswami Aiyar has passed away having been a live force till the last moment of his life The most venerated and popular of the elder statesmen who had built up an enormous reputation in many walks of life is no more No man had lived so rich, active and varied a life as his and filled it with so much achievement and distinction in several fields His career constitutes a rare example of a full and forceful life made possible by a unique combination of natural gifts and personal attainments wherein adventitious luck had not much place

Dr C P was born with more than the proverbial silver spoon in his mouth A handsome presence with piercing eyes foretold the greatness and glory that was to be his It was as if a fairy had whispered into his ears

> "Go on my boy, go on
>
> For the Gods danced at thy birth"

While the first half of his life was one of achievement and spectacular success the second half was one of sublimation and fulfilment A brilliant academic career was followed by phenomenal success at the Bar even at an early age Honours and successes came to him thick and fast His brilliant tenure as Advocate-General, his disinclination to accept a Judgeship of the High Court, his being engaged by the Indian Princes to present their case before the Butler Committee are well-known

His tenure as a member of the Executive Council of the Governor of Madras revealed him as an administrator of the highest calibre endowed with great vision, integrity and ability The Mettur Project and the Pykara Scheme for generation and supply of Hydel power for Madras State are a standing monument to his great foresight and awareness of future requirements It was not so much the glamour of high office as the opportunities it afforded for influencing trends that attracted him to it His subsequent stewardship as Dewan of the Travancore State was characterised by the same vigour and desire to modernise the State and transform its economy The famous Temple Entry Proclamation promulgated on his advice and the nationalisation of State transport are eloquent testimony to his imaginative approach to the State's problems His membership of the Viceroy's Executive Council, though for short periods only, again brought to the fore his administrative talents He was probably one of the very few Indians to be awarded the dignities of K C I E and K C S.I. during the British regime Edwin Montagu, the then Secretary of State for India, recorded in his diary that "C P" was one of the cleverest men he had met in his lifetime

Dr Ramaswami Aiyar was naturally influenced by his aristocratic birth, association and convictions in regard to his approach to politics Pseudo-democratic ideas never appealed to him though he had interested himself actively in the Home Rule and other movements In fact during the last three decades of his life in spite of his colourful politics, he was in the public eye essentially as a profound scholar, an eminent educationist, and a vivid exponent of a life of culture and philosophy

Dr Ramaswami Aiyar had been associated long with education. He had served on the Senate and the Syndicate and had been Vice-Chancellor of more than one University and more than once He was widely read in English, French

and Sanskrit and was exceedingly well-informed on every subject and could therefore play a great role as a cultural ambassador in foreign countries, typical of the best in ancient and hoary Indian traditions and culture He was not only a voracious reader but also a prolific writer His Biography of Dr Besant, Pen Portraits—Essays and Addresses, Phases of Religion and Culture are some of his writings

Dr Ramaswami Aiyar had a great sense of humanity He contributed munificently to several causes and to educational and social institutions It was his contribution that made possible the starting of a Benevolent Fund for Lawyers in Madras He did not aim to be spectacular by giving all his donation to a single cause but believed in distributing the same among a number of objects

Though in politics he was separated from the Ruling Party the Government did not hesitate to avail of his services as Chairman of the Press Inquiry Committee and of the Committee on the administration of Hindu Religious Endowments

Dr Ramaswami Aiyar leaves behind him three talented sons, the eldest of whom is Sri C. R Pattabhiraman, Minister of State in the Ministry of Law, Government of India, who till his acceptance of office in the Central Government was a well-known and highly popular member of the Madras Bar It is a unique case of greatness running for four generations and should have been highly gratifying to Dr Ramaswami Aiyar

Dr Ramaswami Aiyar was unique among the public men of our country He was a perfect synthesis of all that was best in the East and the West A man of great versatility and erudition, a forceful and attractive speaker, a brilliant raconteur, a fine scholar and great advocate, he reached the top in whatever he undertook His passing away creates a void in our public life which cannot be easily filled

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